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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 22

VERMILYA-BROWN COMPANY, INC., NECARO COMPANY, INC., ET AL., PETITIONERS,

vs.

JOHN JOSEPH CONNELL, EUGENE T. FITZPATRICK, WILLIAM L. FLANAGAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 19, 1948.

CERTIORARI GRANTED MARCH 29, 1948

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Proceedings in U. S. C. C. A., Second Circuit	1	1
Statement under Rule 15(b)	1	1
Record from D. C. U. S., Southern District of New York	2	2
Summons in Supreme Court of New York	2	2
Complaint in Supreme Court of New York	3	2
Amended answer	11	8
Request for admissions	14	10
Sworn denial and admission	17	12
Papers read in support of motion for Summary Judgment:		
Notice of motion	18	12
Affidavit of Robert Glenn	20	13
Affidavit of J. Randall Creel	24	16
Deposition of David Joseph Townsend	29	19
Deposition of John Joseph Connell	46	34
Supplemental affidavit of James Randall Creel	74	57
Papers read in opposition to motion for summary judgment:		
Affidavit of David Joseph Townsend	65	51
Affidavit of John Joseph Connell	68	53
Affidavit of Jacob Bromberg	70	54

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—6629

		Original	Print
Record from D. C. U. S., Southern District of New York—Continued			
Opinion by Coxe, D. J.		77	59
Judgment on order		82	62
Notice of appeal		84	63
Stipulation as to record		86	64
Clerk's certificate	(omitted in printing)	87	
Opinion, Clark, J.		88	65
Judgment		99	73
Clerk's certificate	(omitted in printing)	101	
Order allowing certiorari		102	75

[fol. 1]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN JOSEPH CONNELL, EUGENE T. FITZPATRICK, WILLIAM L. FLANAGAN, Joseph John Gilroy, John Joseph Mortimer, James F. McDonald, Paul F. Nieter, William H. Parker, Jr., Louis August Rehberg, Howard L. Shock, Jr. and David Joseph Townsend, Plaintiffs-Appellants,

against

VERMILYA-BROWN COMPANY, INC., NECARO COMPANY, INC. and The Arthur A. Johnson Corp., Doing Business as Bermuda Base Contractors, Defendants-Appellees

STATEMENT UNDER RULE 15(b)

This action was commenced in the Supreme Court, New York County, by the service of the summonses and complaints on the defendants on or about October 20, 1945.

Prior to the service of their answer, defendants applied for leave to transfer the action to the United States District Court for the Southern District of New York. This application was granted ex-parte by order dated January 12, 1946.

Issue was joined by the service of the defendants' answer on or about February 9, 1946. An amended answer was served on or about April 6, 1946.

Defendants thereafter moved for summary judgment which was granted by Hon. Coxe, D. J., and judgment was entered on November 1st, 1946 dismissing the plaintiffs' complaint. No bail, arrest or attachment was made in this action.

Jacob Bromberg, Esq., 225 Broadway, New York City, appears for the plaintiffs.

Eidlitz, French, Fink and Markle, Esqs., 140 East 42nd Street, New York City, appear for the defendants, having been substituted in the place of Eidlitz, French and Sullivan.

Except as above there has been no change of parties or attorneys.

[fol. 2] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

JOHN JOSEPH CONNELL, EUGENE T. FITZPATRICK, WILLIAM L. FLANAGAN, Joseph John Gilroy, John Joseph Mortimer, James F. McDonald, Paul F. Nieter, William H. Parker, Jr., Louis August Rehberg, Howard L. Shock, Jr. and David Joseph Townsend, Plaintiffs,

against

VERMILYA-BROWN COMPANY, INC., NECARO COMPANY, INC. and The Arthur A. Johnson Corp., Doing Business as Bermuda Base Contractors, Defendants

SUMMONS

Plaintiffs designate New York County as the place of trial.

To the above named Defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, September 26th, 1945.

Jacob Bromberg, Attorney for Plaintiffs, Office & P. O. Address, 225 Broadway, New York City.

[fol. 3] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

[Title omitted]

COMPLAINT

Plaintiffs, for their complaint, complaining of the defendants, by their attorney, Jacob Bromberg, allege as follows:

First: This action is brought under the Fair Labor Standards Act of 1938, U. S. C. Title 29, Section 201, et seq. hereinafter called the "Act."

Second: That the defendant, The Arthur A. Johnson Corp., is a corporation organized and existing under and by virtue of the laws of the State of New York and maintains an office for the transaction of its business in the City of New York, within the jurisdiction of this Court.

Third: That the defendant, Necaro Company, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York and maintains an office [fol. 4] for the transaction of its business in the City of New York, within the jurisdiction of this Court.

Fourth: That the defendant, Vermilya-Brown Company, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York and maintains an office for the transaction of its business in the City of New York, within the jurisdiction of this Court.

Fifth: That during all the times hereinafter mentioned the defendants were engaged in a joint venture and transacted business under the trade name and style of "Bermuda Base Contractors."

Sixth: That during all the times hereinafter mentioned defendants furnished labor, services and materials in interstate and foreign commerce or in the production of goods for interstate or foreign commerce.

Seventh: That the plaintiffs were employed by and worked for the defendants in divers capacities, as hereinafter set forth, and in such capacities each plaintiff rendered services in connection with such interstate and foreign commerce or the production of goods for interstate and foreign commerce.

Eighth: From about September 9th, 1941 to April 27th, 1943 the plaintiff, John Joseph Connell, was employed by and worked for the defendants as a fireman.

Ninth: Upon information and belief, during the stated period the plaintiff, John Joseph Connell, worked for the defendants in the stated capacity for more than 1,746 hours in excess of the times provided by the Act for the respective periods of time therein set forth.

[fol. 5] Tenth: From about December 8th, 1941 to May 6th, 1943 the plaintiff, Eugene T. Fitzpatrick, was employed by and worked for the defendants as a fireman.

Eleventh: Upon information and belief, during the stated period the plaintiff, Eugene T. Fitzpatrick, worked for the defendants in the stated capacity for more than 1,775 hours in excess of the times provided by the Act for the respective periods of time therein set forth.

Twelfth: From about April 26th, 1942 to May 12th, 1943 the plaintiff, William L. Flanagan, was employed by and worked for the defendants as a patrolman.

Thirteenth: Upon information and belief, during the stated period the plaintiff, William L. Flanagan, worked for the defendants in the stated capacity for more than 1,242 hours in excess of the times provided by the Act for the respective periods of time therein set forth.

Fourteenth: From about May 6, 1942 to May 12th, 1943 the plaintiff, Joseph John Gilroy, was employed by and worked for the defendants as a fireman-patrol.

Fifteenth: Upon information and belief, during the stated period the plaintiff Joseph John Gilroy, worked for the defendants in the stated capacity for more than 1,219 hours in excess of the times provided by the Act for the respective periods of time therein set forth.

Sixteenth: From about May 6th, 1942 to May 12th, 1943 the plaintiff, John Joseph Mortimer, was employed by and worked for the defendants as a fire-patrolman.

Seventeenth: Upon information and belief, during the stated period the plaintiff, John Joseph Mortimer, worked [fol. 6] for the defendants in the stated capacity for more than 1,219 hours in excess of the times provided by the Act for the respective periods of time therein set forth.

Eighteenth: From about August 13th, 1942 to May 12th, 1943 the plaintiff, James F. McDonald, was employed by and worked for the defendants as a policeman.

Nineteenth: Upon information and belief, during the stated period the plaintiff, James F. McDonald, worked for the defendants in the stated capacity for more than 897 hours in excess of the times provided by the Act for the respective periods of time therein set forth.

Twentieth: From about December 17th, 1941 to December 9th, 1942 the plaintiff, Paul F. Nieter, was employed by and worked for the defendants as a policeman.

Twenty-first: Upon information and belief, during the stated period the plaintiff, Paul F. Nieter, worked for the defendants in the stated capacity for more than 1,172 hours in excess of the times provided by the Act for the respective periods of time therein set forth.

Twenty-second: From about August 9th, 1942 to February 13th, 1943 the plaintiff, William H. Parker, Jr., was employed by and worked for the defendants as a policeman.

Twenty-third: Upon information and belief, during the stated period the plaintiff, William H. Parker, Jr., worked for the defendants in the stated capacity for more than 621 hours in excess of the times provided by the Act for the respective periods of time therein set forth.

Twenty-fourth: From about September 6th, 1941 to May 13th, 1943 the plaintiff, Louis August Rehberg, was employed by and worked for the defendants as a patrolman.

[fol. 7] Twenty-fifth: Upon information and belief, during the stated period the plaintiff, Louis August Rehberg, worked for the defendants in the stated capacity for more than 1,978 hours in excess of the times provided by the Act for the respective periods of time therein set forth.

Twenty-sixth: From about March 23rd, 1942 to May 10th, 1943 the plaintiff, Howard L. Shock, Jr., was employed by and worked for the defendants as a patrolman.

Twenty-seventh: Upon information and belief, during the stated period the plaintiff, Howard L. Shock, Jr., worked for the defendants in the stated capacity for more than 1,357 hours in excess of the times provided by the Act for the respective periods of time therein set forth.

Twenty-eighth: From about December 6th, 1941 to May 12th, 1943 the plaintiff, David Joseph Townsend, was employed by and worked for the defendants as a patrolman.

Twenty-ninth: Upon information and belief, during the stated periods the plaintiff, David Joseph Townsend, worked for the defendants in the stated capacity for more than 1,702 hours in excess of the times provided by the Act for the respective periods of time therein set forth.

Thirtieth: The hours stated in the preceding paragraphs are approximate and represent each plaintiff's best present estimate of the number of excess hours.

Thirty-first: The defendants failed and refused to compensate the plaintiffs for their employment for the time in excess of the hours provided by the Act, at rates not less than one and one-half times the regular rates at which plaintiffs were then employed by the defendants, and have failed and refused to compensate the plaintiffs in any way for the said overtime, except as hereinafter set forth.

[fol. 8] Thirty-second: By employing the plaintiffs for work weeks in excess of those provided by the Act without compensating the plaintiffs at rates provided by the Act the defendants have violated the Act.

Thirty-third: By reason of such violation the plaintiffs, in addition to the statutory compensation, are entitled to damages under the Act computed upon the basis of one and one-half times the regular rates at which defendants employed the plaintiffs as hereinafter set forth.

Thirty-fourth: By reason of the foregoing the plaintiff, John Joseph Connell, is entitled to $3,607.50 statutory compensation, no part of which has been paid except the sum of $885.00, together with $2,722.50 damages, making a total of $5,445.00.

Thirty-fifth: By reason of the foregoing the plaintiff, Eugene T. Fitzpatrick, is entitled to $3,106.25 statutory compensation, no part of which has been paid except the sum of $766.50, together with $2,339.75 damages, making a total of $4,679.50.

Thirty-sixth: By reason of the foregoing the plaintiff, William L. Flanagan, is entitled to $2,180.50 statutory compensation, no part of which has been paid except the sum of $567.00, together with $1,613.50 damages, making a total of $3,227.00.

Thirty-seventh: By reason of the foregoing the plaintiff, Joseph John Gilroy, is entitled to $2,132.19 statutory compensation, no part of which has been paid except the sum of $556.50, together with $1,575.69 damages, making a total of $3,151.38.

[fol. 9] Thirty-eighth: By reason of the foregoing the plaintiff, John Joseph Mortimer, is entitled to $2,132.19 statutory compensation, no part of which has been paid except the sum of $556.50, together with $1,575.69 damages, making a total of $3,151.38.

Thirty-ninth: By reason of the foregoing the plaintiff, James F. McDonald, is entitled to $1,569.75 statutory compensation, no part of which has been paid except the sum of $409.50, together with $1,160.25 damages, making a total of $2,320.50.

Fortieth: By reason of the foregoing the plaintiff, Paul F. Nieter, is entitled to $2,051.00 statutory compensation, no part of which has been paid except the sum of $493.50, together with $1,558.50 damages, making a total of $3,117.00.

Forty-first: By reason of the foregoing the plaintiff, William H. Parker, is entitled to $1,086.75 statutory compensation, no part of which has been paid except the sum of $283.50, together with $703.25 damages, making a total of $1,406.50.

Forty-second: By reason of the foregoing the plaintiff, Louis August Rehberg, was entitled to $3,461.50 statutory compensation, no part of which has been paid except the sum of $903.00, together with $2,558.50 damages, making a total of $5,117.00.

Forty-third: By reason of the foregoing the plaintiff, Howard L. Shock, Jr., is entitled to $2,374.75 statutory compensation, no part of which has been paid except the sum of $619.50, together with $1,755.25 damages, making a total of $3,510.50.

[fol. 10] Forty-fourth: By reason of the foregoing the plaintiff, David Joseph Townsend, is entitled to $3,171.70 statutory compensation, no part of which has been paid except the sum of $772.80, together with $2,398.90 damages, making a total of $4,797.80.

Wherefore:

Plaintiff, John Joseph Connell, demands judgment in the sum of $2,722.50, with appropriate interest;

Plaintiff, Eugene T. Fitzpatrick, demands judgment in the sum of $4,679.50, with appropriate interest;

Plaintiff, William L. Flanagan, demands judgment in the sum of $3,227.00, with appropriate interest;

Plaintiff, Joseph John Gilroy, demands judgment in the sum of $3,151.38, with appropriate interest;

Plaintiff, John Joseph Mortimer, demands judgment in the sum of $3,151.38, with appropriate interest;

Plaintiff, James F. McDonald, demands judgment in the sum of $2,320.50, with appropriate interest;

Plaintiff, Paul F. Nieter, demands judgment in the sum of $3,117.00, with appropriate interest;

Plaintiff, William H. Parker, Jr., demands judgment in the sum of $1,406.50, with appropriate interest;

Plaintiff, Louis August Rehberg, demands judgment in the sum of $5,117.00, with appropriate interest;

Plaintiff, Howard L. Shock, Jr., demands judgment in the sum of $3,510.50, with appropriate interest;

Plaintiff, David Joseph Townsend, demands judgment in the sum of $4,497.80, with appropriate interest; and

[fol. 11] In addition thereto each plaintiff demands a reasonable attorney's fee pursuant to Section 16b of the Act, together with costs and disbursements of this action.

Jacob Bromberg, Attorney for Plaintiffs, Office & P. O. Address, 225 Broadway, New York City.

In United States District Court, for the Southern District of New York

John Joseph Connell, Eugene T. Fitzpatrick, William L. Flanagan, Joseph John Gilroy, John Joseph Mortimer, James F. McDonald, Paul F. Nieter, William H. Parker, Jr., Louis August Rehberg, Howard L. Shock, Jr., and David Joseph Townsend, Plaintiffs,

—against—

Vermilya-Brown Company, Inc., Necaro Company, Inc., and The Arthur A. Johnson Corp., Doing Business as Bermuda Base Contractors, Defendants

(Civil Action 34-733)

Amended Answer

The defendants by Eidlitz, French and Sullivan, their attorneys for their amended answer herein, allege, upon information and belief.

[fol. 12] First: Deny that they have any knowledge or information thereof sufficient to form a belief with respect to any of the allegations contained in paragraphs thereof marked "First" and "Thirtieth."

Second: Deny each and every allegation contained in paragraphs thereof marked "Sixth", "Ninth", "Eleventh", "Thirteenth," "Fifteenth", "Seventeenth", "Nine-

teenth", "Twenty-first", "Twenty-third", "Twenty-fifth", "Twenty-seventh", "Twenty-ninth", "Thirty-first", "Thirty-second", "Thirty-third", "Thirty-fourth", "Thirty-fifth", "Thirty-sixth", "Thirty-seventh", "Thirty-eighth", "Thirty-ninth", "Fortieth", "Forty-first", "Forty-second", "Forty-third" and "Forty-fourth".

Third: Deny each and every allegation in paragraphs thereof marked "Seventh", "Eighth", "Tenth", "Twelfth", "Fourteenth", "Sixteenth", "Eighteenth", "Twentieth", "Twenty-second", "Twenty-fourth", "Twenty-sixth" and "Twenty-eighth" except that the defendants admit that the respective plaintiffs were employed by the defendants for the respective periods of time alleged in said paragraphs (without admitting, however, the number of alleged excess hours), under written contracts, later modified, and for the particular terms and conditions of which said contracts, the defendants beg leave to refer to the originals thereof upon the trial of this action.

As and for a First, Separate and Complete Defense to the Cause of Action Set Forth in the Complaint, the Defendants Allege upon Information and Belief:

Fourth: That the plaintiffs in the performance of their respective duties were not engaged in commerce nor in the production of goods for commerce within the meaning and [fol. 13] purview of the Fair Labor Standards Act of 1938 as amended, nor are they covered by, within the scope of or subject to the terms, provisions and conditions of the said Fair Labor Standards Act of 1938 as amended.

As and for a Second, Separate and Complete Defense to the Cause of Action Set Forth in the Complaint, the Defendants Allege Upon Information and Belief:

Fifth: That the provisions of the Fair Labor Standards Act of 1938 as amended, did not apply to the plaintiffs and that the plaintiffs were exempt therefrom under Section 213 of said Act.

Wherefore, defendants demand judgment dismissing the complaint herein together with the costs and disbursements of this action.

Eidlitz, French and Sullivan, by Joseph Markle, a Partner of the Firm, Attorney for the Defendants, Office & P. O. Address, No. 110 East 42nd Street, Borough of Manhattan, City of New York.

[fol. 14] IN UNITED STATES DISTRICT COURT

[Title omitted]

REQUESTS FOR ADMISSIONS

Please take notice that the defendants Vermilya-Brown Company, Inc., Necaro Company, Inc. and The Arthur A. Johnson Corp., doing business as Bermuda Base Contractors, request the plaintiffs herein to make the following admissions within ten (10) days after the service of this request, for the purposes of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial; that each of the following statements is true:

1. During all times pertinent to this action the defendants Vermilya-Brown Company, Inc., Necaro Company, Inc. and The Arthur A. Johnson Corp., doing business as Bermuda Base Contractors, were corporations engaged in a joint venture under a cost-plus-a-fixed-fee contract with the United States of America, Division of Engineers, United [fol. 15] States Army, Contract No. W 958-eng-50, for the construction of an outlying defense base at the Island of Bermuda, which defense base consists of and is more particularly known as Fort Bell and Kindley Field, located in the leased areas of the Island of Bermuda, leased under the Executive Agreement dated March 27th, 1941 between the United States of America and the Government of Great Britain and Northern Ireland.

2. That the plaintiffs John Joseph Connell, William L. Flanagan, James F. McDonald, Paul F. Nieter, William H. Parker, Jr., Louis August Rehberg and Howard L. Shock, Jr. were employed by the defendants as patrolmen and as such performed the duties of patrolmen in furnishing police protection to the construction work being performed by the defendants under Contract No. W 958-eng-50 for the United States Army at Fort Bell and Kindley Field in the leased areas of the Island of Bermuda, leased under the terms of the Executive Agreement dated March 27th, 1941 between the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland.

3. That the plaintiffs Eugene T. Fitzpatrick, Joseph John Gilroy, John Joseph Mortimer and David Joseph

Townsend were employed by the defendants as firemen-patrolmen and as such performed the duties of firemen in furnishing fire protection to the construction work being performed by the defendants under Contract No. W 958-eng-50 for the United States Army for the construction of Fort Bell and Kindley Field in the leased areas of the Island of Bermuda, leased under the terms of the Executive Agreement dated March 27th, 1941, between the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland.

[fol. 16] 4. That all of the construction work provided in Contract No. W 958-eng-50 between the United States of America and the defendants was original construction and that no part thereof was reconstruction or repair.

5. That each of the plaintiff performed the duties of his employment as patrolman or fireman-patrolman within the territorial limits of the Island of Bermuda and more particularly within the leased areas thereof, leased under the terms of the Executive Agreement dated March 27th, 1941 between the United States of America and the Government of Great Britain and Northern Ireland.

And please take notice that if the plaintiffs serve a sworn denial of the above facts or any of them, the defendants, upon the truth of such fact or facts, will apply to the Court for an order requiring the plaintiffs to pay to the defendants the reasonable expenses incurred in making such proof, including reasonable expense for witnesses and attorneys' fees as is provided in the Rules of Civil Procedure for the District Courts of the United States.

Dated: July 23rd, 1946.

Yours, etc., Eidlitz, French, Fink and Markle, Attorneys for Defendants, Office & P. O. Address, No. 110 East 42nd Street, Borough of Manhattan, City of New York.

To: Jacob Bromberg, Esq., Attorney for Plaintiffs, Office & P. O. Address, No. 225 Broadway, Borough of Manhattan, City of New York.

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

SWORN DENIAL AND ADMISSION

STATE OF NEW YORK,
County of New York, ss:

John Joseph Connell, being duly sworn, says:

I am one of the plaintiffs above named and am fully familiar with all of the facts and circumstances involved in the above entitled action.

Plaintiffs refuse to admit so much of paragraph No. 2 of defendants' request for admissions dated July 23, 1946 which alleges that John Joseph Connell was employed as a patrolman and instead admit that said John Joseph Connell was employed as a fireman-patrolman.

Plaintiffs refuse to admit so much of paragraph No. 3 of defendants request for admissions dated July 23, 1946 [fol. 18] which alleges that David Joseph Townsend was employed as a fireman-patrolman and instead admit that he was employed as a police patrolman.

Plaintiffs refuse to admit the facts set forth in paragraph No. 5 of defendants' request for admissions dated July 23, 1946, because, in addition to the duties set forth in said paragraph, the plaintiffs also were required to and actually did render services in the City of St. George, on St. David's Island and other areas outside these islands aboard ferry boats, tugs, and other vessels in the navigable water around Bermuda and St. David's Island.

John Joseph Connell.

(Sworn to the 31st day of August, 1946.)

IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION FOR SUMMARY JUDGMENT

[fol. 19] SIRS:

Please take notice that the undersigned upon the annexed affidavits of Robert Glenn and J. Randall Creel will

move this Court at Room No. 506, U. S. Courthouse, Foley Square, Borough of Manhattan, City of New York, on the 17th day of September, 1946, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard for summary judgment in favor of the defendants, and for such other and further relief as to this Court may seem just and proper.

Dated, New York, N. Y., September 3, 1946.

Yours, etc., Eidlitz, French, Fink and Markle, Attorneys for Defendants, Office & P. O. Address, 110 East 42nd Street, Borough of Manhattan, City of New York.

To Jacob Bromberg, Esq., Attorney for Plaintiffs, 220 Broadway, Borough of Manhattan, City of New York.

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF ROBERT GLENN, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK,
County of New York, ss:

Robert Glenn, being duly sworn, deposes and says: That he was formerly employed by Vermilya-Brown Company, Inc., one of the defendant joint venture contractors; and that he was so employed during the years 1941, 1942 and 1943; that from March 1941 to July 1943 he was employed by the defendant joint venturers doing business as Bermuda Base Contractors as Superintendent on the job of the construction of the advance military bases on the Islands of Bermuda known as Fort Bell and Kindley Field, and that his duties as such required his presence at all times during [fol. 21] this period at the site of this construction work; that he has personal knowledge and is competent to testify as to all of the facts set out below; that he is thoroughly familiar with the construction work performed by the defendant joint venturers doing business as Bermuda Base Contractors in the erection of Fort Bell and Kindley Field, and that as Superintendent his duties in fact required him to run and supervise said construction work.

That all of the construction work in the construction of Fort Bell and Kindley Field was original construction. Even the site of much of the construction work had first to be prepared by the defendant joint venturer contractors in the leveling off of hills and filling in of bays and other bodies of water. This project was of a complex nature by reason of the many special features and types of work involved, including the grading and paving of approximately four miles of runways and eight and one-half miles of taxi ways, the installation of eight and one-half miles of sanitary and storm sewers, twenty-one miles of water mains, twenty-two and three-quarter miles of fibre and transit ducts, eighteen and one-half miles of power cables, forty-six and one-half miles of fire control cables or 13,211 conductor miles of cables, approximately eleven miles of road and highway, the construction of two hundred and eight--four temporary buildings, many semi-permanent buildings and numerous permanent buildings, including a two hundred bed hospital, laundry, refrigeration plant, fire plants, water evaporator plants, barracks, post exchange, telephone building, fire and guard house, bomb proof structures, gun emplacements and highways leading thereto, hangers, underground bomb proof storage and temporary construction camps for the housing and feeding of workmen. This project consisted of the construction of a self sustaining town, including highways and all other utilities. All of this construction work was new and original construction from the ground up.

[fol. 22] Your deponent is familiar with the duties performed by the plaintiffs in this action and knows that those duties consisted solely of furnishing police and fire protection to this construction work. Because of the magnitude of the construction work the small local police and fire forces of the British Government on the Island of Bermuda were completely inadequate and unprepared to provide the necessary police and fire protection. Military police were not used for police and fire protection since experience on other construction work had shown that unnecessary friction had developed between civilian construction workers and military police. It was therefore necessary for the defendant joint venture contractors as part of this construction work to set up and maintain during the course of the construction a company police force and company fire force. The plaintiffs were employed for this duty and were part of the company uniformed police and uniformed fire forces.

The plaintiffs who were employed as patrolmen performed the duties of a municipal policeman on his beat. The company police force had its own headquarters and guardhouse and the series of posts distributed over the construction work. The company police force was organized in three squads or shifts with a police lieutenant in charge of each and a police captain in charge of all three squads. The duties performed by the personnel of the company police force were such as those performed by any typical municipal police force.

The company fire force likewise had its fire house and station, and its equipment, consisting of chemical trucks, high pressure water systems, hose, etc. It was organized under a fire captain in charge of its three squads, each squad being placed under a fire lieutenant. The duties of the company fire force were the same as those of any typical municipal fire department.

[fol. 23] Both the company police and company fire force were uniformed and both forces were organized and existed solely for the purpose of supplying police and fire protection to the construction work. As the construction work neared completion both forces were cut down and disbanded. None of the plaintiffs ever performed any construction work.

All of the duties of the plaintiffs related to police and fire protection to the construction work being performed in the Islands of Bermuda. Though the plaintiffs were employed in the United States and transported to Bermuda they performed no services for the defendant joint venture contractors in the United States nor in transit to Bermuda. If any of the plaintiffs while in transit were assigned to any duties, such as life boat drills, abandon ship drills, submarine or mine lookout, blackout watch, sick bay or hospital watch, fire fighting watch or any other duty aboard ship, such services were performed by and at the instruction and request of the ship's captain and officers or Navy personnel, and are but duties regularly and commonly performed aboard ship by crew and passengers alike in time of War for the common safety of all concerned, and such duties performed aboard ship are not duties performed in the employment of the joint venture defendant contractors. None of the plaintiffs rendered services to the defendant joint venture contractors in any other place than the Islands of Bermuda.

Robert Glenn.

(Sworn to the 15th day of August, 1946.)

[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF J. RANDALL CREEL, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK,
County of New York, ss.:

J. Randall Creel, being duly sworn, deposes and says: That he is an attorney at law associated with the firm of Eidlitz, French, Fink and Markle, attorneys for the defendants. In such capacity he is in charge of the above entitled case. That heretofore your deponent addressed by letter an inquiry to the Department of State, United States of America, requesting information as to the status of those leased areas in the Islands of Bermuda leased under Executive Agreement of March 27th, 1941, by the United States of America from the United Kingdom of Great Britain and [fol. 25] Northern Ireland, and which are presently occupied by the military installations known as Fort Bell and Kindley Field.

That your deponent received the following communications in reply to his inquiry:

"Department of State
Washington

April 30, 1946.

In reply refer to
Le 811.34544/4-1846

Eidlitz, French, Fink and Markle, Counsellors at Law,
110 East 42nd Street, New York 17, New York.

SIRS:

The Department has received your letter of April 18, 1946, requesting to be advised whether 'any United States Courts other than Army and Navy Military Courts have been established at the leased area in the Island of Bermuda.'

There are no civil courts of the United States in any of the leased base areas obtained from Great Britain, including Bermuda.

Very truly yours, For the Acting Secretary of State: (Sgd.) Benedict M. English, Assistant to the Legal Adviser."

[fol. 26] "Department of State

Washington

June 20, 1946.

In reply refer to
Le 811.34544/5-146

Eidlitz, French, Fink & Markle, 110 East Forty-Second Street, New York 17, New York.

Sirs:

The Department has received your letter of May 1, 1946 with further reference to the status of bases leased from Great Britain.

The bases in Bermuda were obtained under the same circumstances as the other bases obtained from Great Britain as will be apparent from the documents contained in Executive Agreement Series 235 to which you were referred in a previous communication. As you were advised by the Department's letter of April 30, 1946 this Government has not made any claim that the bases in Bermuda are territories or possessions of the United States and there would therefore appear to be no reason for any ruling or opinion on the matter.

Very truly yours, For the Acting Secretary of State: (Sgd.) R. W. Flournoy, Acting Legal Adviser."

That your deponent addressed an inquiry to the Director, Division of Territories and Island Possessions of the Department of the Interior, who by Title 48, Section 1, U. S. [fol. 27] Code, as amended, is charged with the civil government of all island possessions of the United States, requesting information as to what jurisdiction, if any, had been exercised by such Department over the leased areas on the Islands of Bermuda. By letter of August 2nd, 1946 H. Rex Lee, Acting Director, Divison of Territories and Island Possessions, U. S. Department of the Interior, advised in part as follows:

"We have never been given jurisdiction, by Executive order or by operation of the reorganization plan or other statute, over the Bermuda areas in which you are interested and have therefore had no occasion to take any action in 'matters pertaining to the civil government' thereof. Moreover, since the State Department

has advised you that there has been no claim made that the leased areas are possessions of the United States, even if 48 U. S. C. sec. 1 had given this Division jurisdiction over civil government in all United States possessions, we would have had no reason to take any action in connection with the leased areas."

There is no genuine issue as to any material fact on which this motion for summary judgment is based. Heretofore on July 23rd, 1946 the attorneys for the defendants served a request for admissions upon the attorneys for the plaintiffs which is duly filed herein, requesting the admission of material facts on which this motion is based and as to which it was believed there was no controversy.

No denial of any such request has been served upon the attorneys for the defendants within the ten (10) day period designated in said request, nor has any application been made to the Court for an extension of time, and the said facts set out in said request for admissions are now deemed admitted in accordance with the provisions of Rule 36 of the Rules of Civil Procedure for the District Courts of the United States.

[fol. 28] The facts which are so admitted are:

1. Each of the plaintiffs performed the duties of his employment within the territorial limits of the Island of Bermuda and more particularly within the leased areas thereof (Request No. 5).

2. The construction work performed by the defendants was original construction and no part thereof was reconstruction or repair (Request No. 4).

3. The sole duties of the plaintiffs were the furnishing of police and fire protection to the original construction work being performed by the defendants in the Island of Bermuda (Requests Nos. 2 and 3).

That as a matter of law the defendants are entitled to a judgment as to all the plaintiffs in this action based upon these material facts regarding which there is no genuine issue as will be seen more fully from the authorities cited in the defendants' memorandum of law in support of this motion, since the Fair Labor Standards Act of 1938 does not apply to employment in the Islands of Bermuda or the leased areas thereof, and since the employment of the

plaintiffs in affording police and fire protection to original construction was purely "local" and is not "in commerce or the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938 as amended.

Furthermore, as to the plaintiffs John Joseph Connell and David Joseph Townsend, whose depositions were heretofore taken on April 27th, 1946 the defendants are entitled to judgment based upon the admissions made by the said parties plaintiffs therein; it appearing from said admissions that the said Connell and Townsend were bona fide administrative and executive employees and as such exempt from the provisions of the Fair Labor Standards Act of 1938 as amended.

James Randall Creel.

(Sworn to the 3rd day of September, 1946.)

[fol. 29] In United States District Court

[Title omitted]

Deposition of David Joseph Townsend

Deposition held at the office of Eidlitz, French and Sullivan, 110 East 42nd Street, New York, N. Y., on April 27, 1946, at 10:00 A. M., pursuant to Notice dated April 12, 1946.

Appearances:

For the Plaintiffs: Jacob Bromberg, Esq., 225 Broadway, New York, N. Y.

For the Defendants: Eidlitz, French & Sullivan, 110 East 42nd Street, New York, N. Y. By Randall Creel, Esq., of Counsel.

[fol. 30] David Joseph Townsend having first been sworn before a Notary Public of the County of New York, State of New York, took the stand and testified as follows:

Direct examination.

By Mr. Creel:

Q. Please give your full name and address.

A. David Joseph Townsend, 57 West Main Street, Warren, Massachusetts.

Q. You are a plaintiff in this action?

A. That is correct.

Q. During what period of time were you in the employ of the Bermuda Base Contractors named Vermilya-Brown Company, Inc., Necaro Company, Inc., and The Arthur A. Johnson Corporation?

A. From December 6, 1941 until May, 1943, I believe it is May 12th.

Q. Where was the place of your employment? Where did you perform your duties?

A. In Bermuda.

Q. Were all of your duties performed in the Island of Bermuda?

A. In a sense, part of my duties were performed on a ship running from Bermuda—it was just for two days.

Q. Now, when and where was that, and what was the name of the ship?

A. That I am afraid I couldn't help you on. I don't remember the name of the ship. There was quite a few of the fellows coming back on that ship and they impressed a number of us into service during passage from Bermuda. It was just two days, but aside from those two days all our duties were in Bermuda.

Q. Well, what was the time when you performed this duty aboardship?

A. Well, as far as I am concerned, I don't remember the exact tours or watches that I stood—that is as a group. They picked out quite a few of us to guard various passageways and were formed into reliefs and whatnot.

Q. Well, what time?

A. During the entire period of our sailing.

[fol. 31] Q. When was this sailing? Was it when you were returning to the United States?

A. That's right.

Q. That is after your duties in Bermuda had terminated?

A. That is correct.

Q. And that would be at the end of your employment?

A. That's right.

Q. Do you remember the name of the ship?

A. No, I am afraid not.

Q. What duties did you perform aboard this ship which name you don't remember?

A. It was preventing the base workers from going into

restricted areas, preventing smoking in restricted areas, keeping them off decks at night. There were quite a few submarines at the time and protecting various parts of the ship, such as life preservers; see that none were taken in certain areas where they were supposed to be hanging, and also to prevent possible wars. You know, a good many of these fellows down there may have brought in some liquor and what not, and they were great ones for getting into difficulties; any difficulties like that were taken care of too, I mean, just to keep peace.

Q. You were performing patrolmen's duties? Policemen?

A. Yes, general police duties, yes.

Q. This was for a period of two days just at the end of your employment?

A. That is correct.

Q. Where had you been paid off? Your final payment?

A. In New York.

Q. After you arrived?

A. That is correct.

Q. You hadn't received final payment and signed releases in Bermuda?

A. No.

Q. You did sign a release?

A. I believe so, yes.

Q. Well, now, Mr. Townsend, will you describe fully and in detail just what duties it was that you performed at Bermuda?

A. Well, in Bermuda——

Q. First, what was your name? Give the title?

A. Well, to start with, I was a patrolman. After a few months I was promoted to Sergeant.

[fol. 32] Q. Now, will you tell us in detail the duties of a patrolman?

A. The duties of a patrolman were generally they were assigned to a post. They were to protect that post and all areas surrounding that post—a sort of a fire watch against possible drunks, fights and illnesses. Practically everything. It was purely police duties.

Q. You did no manual work, no construction work?

A. No, not actually.

Q. Or mechanical work?

A. No, except possibly on the car. They had two police cars. Occasionally minor repair was required, but that was

not a part of our duties and consequently it couldn't really be called manual labor.

Q. There were mechanics on the job to do that?

A. They had mechanics in what they call the Industrial Area that did make repairs, but our only duties were possibly blowouts or something, and we had to change tires. That was more or less a normal state of affairs.

Q. You do that just as a policeman would do that in the United States?

A. That's right.

Q. In making the repairs on his police car?

A. That's right.

Q. In so far as tires are concerned?

A. Tires, or just minor adjustments—carburetor or something. They had a good deal of trouble with the cars.

Q. Well, is it true, then, Mr. Townsend, that as patrolman your duties were purely police duties?

A. That's right.

Q. You do not contend that you performed any extra duties aside from police duties?

A. Well, I don't believe so. Picking up accident cases and so forth, that all comes pretty much under police duties. That is correct.

Mr. Creel: Off the record.

(Discussion off the record.)

[fol. 33] By Mr. Creel:

Q. Mr. Townsend, to the best of your knowledge and belief were the duties performed by the patrolmen, all duties which are performed by the police of the City or the Municipality?

A. That is correct, generally the duties were all the same, with one possible exception. For quite a while they did assign a patrolman to drive the car. Those were his only duties, was driving the police car.

Q. That was a police car that he drove?

A. That is correct. Then later they put a driver from the motor pool or whatever they call it as a driver for the police car. Quite frequently we drove it ourselves.

Q. The driving of the police car was in connection with police duties?

A. Yes, sir, with police duties, but aside from that it was strictly police duty in all respects.

Q. Now, where in the Island of Bermuda did you perform these duties? Were they all on the reservation or the so-called reservation which is now known as Kindley Field and Fort Bell, or were they performed outside the reservation in other parts of the City of Bermuda, of the Island of Bermuda?

A. They were performed outside the city. We had sort——

Q. (Interposing:) Outside the reservation?

A. That is correct. In Bermuda proper, that is British territory. We had a working agreement with the Bermuda police, the Bermuda Constabulary I believe they call it, whereby any base worker or American citizen got into some minor difficulty such as drunkenness or fighting or something that wasn't too serious we would go over there and pick them up or sometimes they would arrest them and turn them over to us. Of course, if it was anything of serious nature they would hold them for trial themselves, and on the same ground the Bermuda Constabulary came over on the base for Bermudians that happened to be working on [fol. 34] the base. It was just a little working agreement between us, so in that sense we did quite frequently perform duties outside the base, but it was all pertaining to the base.

Q. Well, now, were these posts to which you were assigned all located in the reservation or were some of these posts located outside the reservation in other portions of the Bermuda Island?

A. Well, they had a hospital that was actually in Bermuda territory. We did have a post over there taking care of the drunks—we call them D.T.'s and mental cases and whatnot. That was in I believe, it was an ex-inn or a small hotel or something that was taken over by the Army Engineers as a hospital. We had a post there quite frequently.

Q. What was the number of that post?

A. I believe they just called it the hospital post. You see, it wasn't a permanent post. It was only when they actually required them there.

Q. These posts had a number?

A. The majority of them did, yes.

Q. And they also had a shanty, didn't they?

A. Not necessarily. A couple of them did, but they did put up a little shanty, oh, several months before we left,

just a small square box. It was a shelter of sorts but part of that time there were no shelters other than possibly in the doorway of a building if it was really nasty.

Q. Well, what other posts were there off of the reservation?

A. Then, the other one was at the Hotel St. George and that had been taken over by the Army Engineers for the Engineers' staffs and office workers and whatnot. We had a post around that and inside that hotel. That was in St. George in Bermuda.

Q. And these posts each carried a certain area with it?

A. That is correct.

Q. And the duties performed by the man assigned to the post were comparable to the policeman on a beat?

A. That is correct.

[fol. 35] Q. Did any of these posts include the dock at Hamilton?

A. They did have a temporary post down there. Occasionally when a ship arrived they would send a full detail—one or two men down to just sort of clear the decks to take care of Bermudian base property rather, and partly to receive base workers. When a ship came in at Hamilton they had to assign them to cars and that line train they had.

Q. Do you know the number of that post?

A. They had no number on there. It was a special post merely for such occasions. There was no regular post there.

Q. Didn't you have a regular post, a numbered post at the docks in St. George?

A. No, we had no actual post ourselves, although we did have Bermudian watchmen on the docks in St. George and we were in direct charge of them and had to go over there.

Incidentally, that was another part of our duties outside of the base property. The sergeants did have to check their watchmen and we drove right through the docks and in St. George.

Q. And these watchmen were Bermudians? Citizens?

A. Yes.

Q. But you had no post on the docks?

A. Other than those watchmen we had no actual police posts of our own.

Q. Did you or any other patrolman have any part in the unloading of any ships?

A. Only in a protective capacity mostly for the base workers coming in, as I just explained, coming in and being

turned over to the cars and so forth, and also in loading ships we quite frequently saw that the men got on some of them—they had been celebrating and whatnot. We went over there and put them aboard ships and so forth and stood by until the ships sailed, but that was a special duty to no numbered post or regular post.

Q. What percentage of your time was taken up by performing police duties in connection with the escorting of drunks off of or on to ships?

A. Well, comparably little. It would be hard to give any [fol. 36] percentage. We used to take them down from either the base, quite frequently we would lock them up for safekeeping or from the hospital, and take them down to the ship just prior to sailing and stand by until they sailed—probably not more than perhaps an hour and a half or two hours at the most on any given ship, and just prior to its sailing, as soon as the ship sailed before they pulled in the gangplank, why, our duties were finished.

Q. Well, in this caring for drunken personnel would you perform any duties other than a police officer or a patrolman would perform in a city in taking care of a drunk?

A. I don't believe so, no. There is a possibility, of course, that we were sending these drunks out—we locked them up and then sent them home. Looking them up, of course, would be performed in any city, but I don't know if a police officer would send them or see that they got home properly.

Q. Have you never seen a police officer start somebody home or take him home?

A. Well, they might put him in a cab, but once they are arrested as a D.T. or just an habitual sot usually when they sober them up or turn them loose—but that is a minor point and doesn't really matter.

Q. Now, you worked a seven-day week?

A. That is correct.

Q. You worked a nine-hour day?

A. That's right.

Q. You received time and a half pay for all hours over fifty-six, didn't you?

A. Hour over fifty-six?

Q. That is hours a week over fifty-six?

Mr. Bromberg: Off the record.

(Discussion off the record.)

By Mr. Creel:

Q. Is this correct? You and other patrolmen worked each week fifty-six hours a week?

A. That is correct.

Q. At a salary of a dollar an hour?

A. That's right.

Q. And for all time worked over fifty-six hours a week you received time and a half?

[fol. 37] A. Well, I wouldn't say that because quite frequently we were more or less on call—I mean at all hours over fifty-six we received time and a half for that extra hour over fifty-six, but sometimes we were called on special duties and whatnot at all hours of the day and night. But actually the answer is yes to that question. All hours over fifty-six we were paid time and a half for overtime.

Mr. Creel: Off the record.

(Discussion off the record.)

Mr. Creel: It is stipulated by Mr. Bromberg that no claim will be made in this case for any hours worked over sixty-three per week.

Mr. Bromberg: That is right and the plaintiffs all concede that they were paid time and a half for all hours over fifty-six hours per week up to sixty-three hours per week.

By Mr. Creel:

Q. It is also true that on holidays such as the Fourth of July, George Washington's Birthday, Armistice Day, Thanksgiving Day, Christmas, New Years and other legal holidays you received double time?

A. That is correct, for national holidays.

Q. That was double time, not only overtime but double time regular time?

A. That's right.

Mr. Creel: Computed on the basis of a fifty-six-hour week.

Mr. Bromberg: That's right.

By Mr. Creel:

Q. It is true, Mr. Townsend, that all patrolmen and their officers were employed on a fifty-six-hour week, is it not?

A. That's right.

[fol. 38] Mr. Bromberg: Off the record.

(Discussion off the record.)

By Mr. Creel:

Q. You were promoted from a policeman, weren't you, or a patrolman?

A. That is correct.

Q. When was that?

A. I don't remember the exact date, but I have brought along my report book and I think that there might be an indication there.

Q. Were you promoted about the 18th of July, 1942?

A. That is correct. I was just going to say that, about the 18th.

Q. From that time forward you were paid at a different rate?

A. That's right.

Q. What was that rate?

A. I don't recall the exact rate.

Mr. Creel: Off the record.

(Discussion off the record.)

A. (Continuing:) $64 plus 5½ for the extra seven hours between fifty-six hours and sixty-three hours per week.

Q. Is that correct?

A. That is correct.

Q. What was the title when you were promoted?

A. My title was changed from patrolman sergeant-of-police.

Q. Now, what were your duties as sergeant-of-police?

A. As sergeant-of-police I posted men, patrolmen, answered various calls, riots, fires or disorders, and checked posts and watchmen, that is patrolmen and watchmen and took charge of various small details taking care of riots or something of the sort. Generally that was all. Other than that my duties were usually in the station house waiting for something to come up.

Q. Who was your immediate superior?

A. My immediate superior was Captain Reynolds.

[fol. 39] Q. Who was Captain of the police force?

A. That's right

Q. He would not come on duty all twenty-four hours a day?

A. No.

Q. The time of the police force was broken off into three quarters wasn't it?

A. That's right.

Q. Sometimes you would be in charge of Squad 1, sometimes of Squad 2, and sometimes of Squad 3?

A. That's right. Three reliefs.

Q. And the twenty-four hours was divided between these three squads?

A. That's right.

Q. You had no particular period of time that you were always in charge of?

A. No, it changed weekly. It rotated.

Q. During the time that you were acting as a sergeant in charge of a squad, you would be in control of that squad, wouldn't you?

A. That is correct.

Q. You would supervise the patrolmen in the performance of their duties?

A. Absolutely.

Q. Now, approximately how many patrolmen were there?

A. Well, that fluctuated too. At times I believe the greatest number of patrolmen on each squad was about eighteen or twenty, I am not certain of the number.

Q. You would assign patrolmen to their posts?

A. Yes, sir.

Q. And you would supervise their work and watch them?

A. That's correct.

Q. If you found that a patrolman was derelict in his duties you would report him?

A. Or take him off post and bring him in. That is correct.

Q. If you found that a man was particularly good, you would recommend him?

A. That's right.

Q. Would you have anything to do with recommending that a person found to be inefficient be discharged?

A. Yes, sir, I mean a recommendation only. I had nothing beyond that.

Q. Would you have power to recommend a man that was [fol. 40] particularly good be given recognition and promoted?

A. Yes.

Q. Now, in addition to supervising these eighteen police, eighteen to twenty patrolmen, you would also supervise the work of the locally employed watchmen?

A. That's right.

Q. Approximately on each relief no more than seven or eight I guess. Off the record.

(Discussion off the record.)

Q. Would you say between six——

A. (Interposing:) Oh, six, and perhaps ten. As a matter of fact it was probably much closer to ten.

Q. And you would supervise there the work of the watchmen?

A. That's right.

Q. Now, just how would you supervise it?

A. Merely by giving them instructions on various special duties or new duties or re-assign them to the posts or just checking to see that they were on duty.

Q. And when on duty you would be in your central headquarters, Police Headquarters?

A. Either there or patroling the various posts that is going around and checking them in.

Q. At the central headquarters you would receive reports if reports were to be made?

A. That's right.

Q. Did you have any assistants when you were acting as Supervising Sergeant?

A. There was one man on duty in the station in Headquarters in the event that I was called away—his regular post there. Of course, during the day time Captain Reynolds and the Lieutenant were on duty during the days. They normally left in the afternoon and four to twelve and twelve to eight watches—that is the reliefs—the Sergeant was in charge, in complete charge. If anything extraordinary came up he would call the Captain. He lived down there.

Q. You would perform your duties as supervisor during [fol. 41] the day under their general——

A. (Interposing:) Subject to the Captain or Lieutenant.

Q. Subject to his general supervision?

A. That is correct.

Q. But at night?

A. We were in complete charge of all police duties.

Q. Now, were any of your duties as sergeant or as patrolman, were they manual duties? Were they mechanical duties or the duties of the laborers?

A. No.

Q. What was your responsibility as sergeant-of-police?

A. Well, I was responsible for the conduct of the men in that particular relief, or for that matter responsible for all things pertaining to police duties. If there were a riot; for example, and it was not taken care of, I was directly responsible. If someone were injured in an accident and that was part of my duty I was directly responsible if that wasn't taken care of.

Q. You were more or less the acting Police Chief?

A. During my tour of duty. That is correct, except, of course, during the day time when the Captain or Lieutenant were there, but even then I was primarily responsible.

Q. You have had some training for this type of duty, and experience, have you not?

A. To a certain extent, yes.

Q. What has that been?

A. I worked as a store detective in different places—Macy's and Gimbel's and so forth; as a prison guard in the Naval Prison, at Portsmouth and—well, I guess that would be about it.

Q. You had also performed police duty for the Irving Trust Company?

A. Oh, that's right. Yes.

Q. Well, when on duty you were, that is as supervising sergeant you had a position where you had to exercise considerable discretion and judgment, did you not?

A. I believe so, yes.

Q. Could you spell that out as to just where you were called upon in your duties as sergeant to exercise discretion or judgment?

A. Well, in some respects pertaining to—well, drunks, for example. There are several types of drunks. Some of [fol. 42] them—it was just a knowledge of the type as to just what disposition would be made of him, for example. Some of them were just no hope—we had to lock them up. As to others, quite frequently you were able to reason with them and even drunk as they were see that they got to bed and kept quiet and sort of took things easily generally. That was part of your discretion. Then a riot for example—judgment and discretion played a very important part in breaking them up. That just offhand is I think about all I can think of.

Mr. Creel: Off the record.

(Discussion off the record.)

By Mr. Creel:

Q. Suppose that you were at Headquarters and a call or a report would come in, would it require the exercise of judgment and discretion to determine whether that was an alarmist call or whether that required action?

A. Whether or not it was an alarmist call, it was usually taken care of. I went down on all calls, regardless. Now and then, in fact quite frequently there was alarmist calls in that some drunk would come in, just make a little noise and it would be reported as a riot or something, but I went down on all calls.

Mr. Creel: Off the record.

(Discussion off the record.)

Cross-examination.

By Mr. Bromberg:

Q. Mr. Townsend, in answering the questions just propounded to you, covering your duties, you talked about police work connected with human beings on this job. Will you please describe in what way your duties covered the materials and equipment that was located in the Bermuda [fol. 43] base at the time you worked there?

A. Well, we were responsible for all things pertaining to the base—material, equipment, buildings and the property itself. In fact, we were responsible for the protection against fire, theft or anything else.

Q. Now, were all these materials that you were responsible for materials used at the Bermuda base only or were they used in other locations also to your knowledge?

A. Well, most materials that came down there were used right at the Bermuda base. Some equipment, of course, was sent off to other places. I couldn't say where.

Q. Was it part of your duties and the duties of the other police officers to supervise or guard the loading of materials and equipment either aboardship or taking this material and equipment off the ships?

A. Well, no. That would come under more the watchmen. The watchmen were directly responsible for all things on the dock whether being loaded or unloaded. We, of course, exercised supervision of the watchmen, but as far as having actual patrolmen on duty on the dock, I don't recall any incident.

Q. Was it part of your duties and the duties of other police officers to supervise or instruct the watchmen that did guard these materials and equipment which were being loaded or unloaded on the docks?

A. Yes, we were in direct charge of the watchmen in supervision, giving of orders of different duties and so forth.

Q. Can you give us any specific instances of occasions where either materials or equipment was removed from the Bermuda base aboardship to be shipped elsewhere?

A. Well, certain piece- of equipment were off the base or crated up or otherwise prepared for transportation and removed from the base. Just what happened to them I couldn't say. I never followed them particularly. We were responsible for all equipment on the base, and for that matter on the docks, but any specific piece of equipment, I am afraid I couldn't help on.

Mr. Bromberg: That is all.

[fol. 44] Redirect examination.

By Mr. Creel:

Q. Mr. Townsend, it is true that the Bermuda Base Contractors had a supply department, is it not?

A. I believe so. Yes.

Q. And it is true, is it not, that that supply department was primarily charged with the receipt and shipment of all materials, equipment and supplies?

A. That is correct.

Q. It was charged with the warehousing, the checking and the use of such materials, equipment and supplies?

A. Yes, sir.

Q. Now, it is also true, is it not, that the patrolmen and their officers in connection with material, equipment and supplies performed purely police duties?

A. That's right. Protection against damage or theft.

Q. Did you or any other policemen have anything to do with the shipping out of any equipment, material or supplies?

A. Not at all, except police supervision.

Q. And is the statement true of the receipt of materials, equipment and supplies?

A. The same is true.

Q. Your only connection was that of furnishing police protection?

A. That is correct.

Q. Now, when materials were arriving isn't it a fact that the supply department was in complete control?

A. That is right.

Q. Isn't it a fact that no police officer would be assigned to the dock for the receipt of material while the ship was being unloaded?

A. I don't remember any specific incident. I don't believe they were. There might have been an odd one in there—that watchmen were in charge of the dock, I mean.

Q. Isn't it a fact that the watchmen were assigned to the dock only when the loading ceased and the stevedores were taken off the dock?

A. No, not necessarily. They had regular duties, tours of duties and were on that duty whether or not there was a [fol. 45] ship there. Their duties consisted of fire protection too.

Q. Well, isn't it a fact that most of these ships were unloaded during the daylight hours?

A. The majority, though some of them they did put floodlights on. That didn't make too much difference.

Q. Well, isn't it a fact that the watchmen were not on duty during daylight hours but only in the night hours?

A. Frankly, I don't remember. I know some of the watchmen were relieved. That is, they had no daylight hours, tours, but I believe one or two of them did. Whether they were on the docks I don't remember just at the moment, but generally they were on night watches.

(Whereupon, this witness was excused.)

(Subscribed and sworn to by David Joseph Townsend this 19th day of August, 1946.) Sol L. Firstenberg, Attorney and Counsellor-at-Law, Residing in Queens County, Office & P. O. Address: 225 Broadway, N. Y. C. Queens Co. Clk's No. 32, Reg. No. A-150-F-7, New York Co. Clk's No. 31, Reg. No. A-643-F-7, Kings Co. Clk's No. 49, Reg. No. A-412-F-7, Term expires March 30, 1947.

[fol. 46] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEPOSITION OF JOHN JOSEPH CONNELL

JOHN JOSEPH CONNELL, having first been sworn before a Notary Public of the County of New York, State of New York, took the stand and testified as follows:

Direct examination.

By Mr. Creel:

Q. What is your address?

A. 1674—71st Street, Brooklyn, New York.

Q. You are a plaintiff in this action?

A. Yes, sir.

Q. During what period of time, Mr. Connell, were you employed by the Bermuda Base Contractors?

A. I left New York September the 6th, 1941 and arrived in Baltimore back April 30, 1943.

Q. Now, where were your duties performed?

A. Mine? When I got down in St. David Island I was assigned to the ship "Berkshire".

[fol. 47] Q. What was the ship "Berkshire"?

A. It was the sleeping quarters, cooking quarters, all the material was stored there—perishable material and everything—water, fresh water and everything out there, so we watched it. There was over five hundred people sleeping on it and it was all frame.

Q. It was used as a dormitory?

A. Sleeping quarters, dormitory.

Q. Or barracks?

A. Barracks.

Q. Now, what were the duties that you performed at Bermuda?

A. Well, I was hired here in New York for forty-eight hours a week, $56 per week. That is what I was hired for.

Q. What duties were you to perform was the question.

A. Fire patrolman, to extinguish any fire, look out for hazards and report them, and take care of the fire apparatus; fill up the lamps with kerosene oil during the day to have light and light them at night and extinguish them in the morning.

Q. All these duties were performed in the Island of Bermuda?

A. Bermuda, and fill extinguishers, find any of them knocked over or broke—report them.

Q. You have been a fireman and had lots of experience?

A. Yes, I had twenty-eight years of it.

Q. Quite a lot of training as a fireman, haven't you?

A. Oh, yes.

Q. And is it true, Mr. Connell, that the duties that you performed at Bermuda were typical of the duties performed by firemen?

A. Firemen in a fire house.

Q. In the City of New York?

A. In the City of New York—outside going out and cleaning lamps and filling them and going out in the fields and filling extinguishers.

Q. Well, that is typical of the duties performed.

A. In New York you did it in the house.

Q. (Continuing:) Of firemen in our Municipal Fire Force?

A. Yes, here going outside to do it. We had to go out [fol. 48] through the section, carry kerosene oil and fill them up, clean the lamps and light them.

Mr. Creel: Off the record.

(Discussion off the record.)

A. (Continuing:) Well, the duties in Bermuda were very near the same as the duties for a fireman in New York City, except we had to go outside to fill fire extinguishers and report any of them that were broken. We had to fill red lamps—we had red lamps hung on every section where there was fire extinguishers at night time throughout the island where the material was stored. We had to fill them and see that they were kept lit all during the night, and if any hurricane was reported we had to go out and put them out. Not a hurricane, but they were afraid of a raid—we had to go out and put all the lights out. That is what we had to do at night time.

Q. Now, were the duties performed on that area known as the reservation, namely, Kindley Field, at Fort Bell, or were they performed in other parts of the Island of Bermuda?

A. Well, in St. David's Island—now, I have them by

name. Saunder City, Poole City, White City, the Industrial Area, Berkshire, Long Bird, and we had a crash wagon in the field where all the planes that was coming in.

Q. And all this was performed in the reservation?

A. In the reservation. Then, we had to go over to the other side of St. George on the hill there and they have fire extinguishers there—fifty-gallon portable extinguishers. We even had to go to St. George's Hotel to put a fire out one night.

I believe I was outside of the reservation part of the time.

Q. Well, now, you have referred to the fact that you were employed for a forty-eight hour week?

A. Forty-eight hours a week.

Q. Mr. Connell, I show you a directive signed by the Lieutenant Colonel D. G. White, the Corps of Engineers, in [fol. 49] which he specifies the salary for firemen and lieutenants among others, and he says that salaries are based on a fifty-six hour week with time and half for overtime. A copy of this——

A. (Interposing): This is in 1942.

Q. (Continuing): A copy of this was sent to Lieutenant Walsh of the Fire Department under——

A. (Interposing:) December 31st.

Q. (Continuing:) —of 1941, in which it says that inasmuch as your working week now comprises fifty-six hours this will mean that your force will work sixty-three hours per week and all men in your department will be paid time and a half for the additional seven hours of work.

Q. Did you ever see this?

A. Yes, I saw this, but we had a different one. You see, I was four months on forty-eight hours a week. You see, I went down in September—September, October, November and December, forty-eight hours a week we worked. Well, two of our fellows quit. One quit right away, so we had only a few men, so we were all quitting. We wouldn't work for that money, so they gave us the extra dollar and a half and that put us over on the other day which we asked to be paid for and we would ask Mr. Saunders—a couple of us went to Mr. Saunders. We went to Mr. Glenn and they were to take it up with Colonel White, but nobody ever paid any attention to it.

Mr. Creel: Off the record.

(Discussion off the record.)

By Mr. Creel:

Q. It is your contention, then, Mr. Connell, that at the time you were employed you were given a mimeographed sheet?

A. Yes, sir.

Q. Which said that you were to work forty-eight hours a week?

A. Forty-eight hours a week.

[fol. 50] Q. That mimeographed sheet wasn't a part of your contract, was it?

A. It was all given to us the same time.

Q. Well, is it a part of your signed contract?

A. Here?

Q. Here is a signed contract.

A. I don't know. I didn't even look at that.

Mr. Bromberg: Counsel for the plaintiff stipulates that this particular mimeographed sheet referred to was a separate sheet of instructions handed by the employment agent who hired these men to them at the time that they executed their respective contracts, and it is admitted that there are no signatures on this mimeographed sheet—merely instructions stating hours of work and instructions as to the conduct of the employees at the base and means and methods of cashing their pay checks.

In some instances some of these mimeographed sheets had a pencil or ink line through the Arabic numerals 48 and 56 written over them. In some instances the Arabic numerals 48 was unchanged.

By Mr. Creel:

Q. Well, Mr. Connell, you have seen this directive from Colonel White and the letter from the Bermuda Contractors, a copy of which went to Lieutenant Walsh of the Fire Department?

A. Yes.

Q. Do you remember approximately when it was that you saw that?

A. Oh, we had no office, he just had his bedroom office.

Q. Well, do you remember when?

A. Well, I must have seen it maybe in January.

Q. 1942?

A. 1942.

Q. So that from that time on you knew that you were on a fifty-six-hour week?

A. Yes.

Q. And time and a half for overtime?

A. We went to see Mr. Saunders about it and they were [fol. 51] to take it up. When we got the extra hour we all started to kick. Well, everybody was saying, "Well, we will take it up, we will see what to do." And nobody paid any attention to us.

Q. Well, some time after, approximately January 1st of 1942 you were paid on a fifty-six-hour week with time and a half for the seven hours over the fifty-six?

A. Yes.

Q. Now, you have described pretty fully the duties which you performed as a fireman. Is there anything more we should know about the duties of the other firemen?

A. Well, I was promoted.

Q. Well, we get to that.

A. Well, the other firemen as well.

Q. They performed pretty much the same kind of duties?

A. Well, everyone had a different section, like some of them had barracks. Now, in some sections we could afford six men, we had six men placed at one barracks like Saunder City. Well, they had to patrol in twos in three different shifts. They had to patrol in twos all night or all day and examine everything and report anything that was serious to the Captain; make reports of it.

Q. You mean by way of fire hazards?

A. Fire hazards or dangers like, you know, we had to report everything to the Safety Engineer in regard to people getting hurt. Several places there would be holes without no lights—people coming along and at night walking into holes. We used to have to report that to the Safety Engineer, so we used to do everything we thought was necessary to protect life.

Q. Now, any fires we had we reported them. Now, the only one serious fire we had down there was about the 9th or 10th of September, 1941. Outside that we never had a serious fire. All little ones confined to the starting point.

Q. You had regular fire equipment in the fire house?

A. We had no fire house. We had equipment throughout the section, like we had a pumper, these pumpers had to be [fol. 52] taken—we used to have to get a wagon, a truck

and certain trucks were made to hook up the pumper to in the back and pump water to any place that there was a fire. That was the first time, but after a little time we had fire hydrants and everything down there, but these pumpers had to be kept in condition and we had to have them cleaned and every day we gave instructions to some of the men that were working down there, how to operate them.

Now, we reported all fires so anybody, any drunks that set bedrooms on fire, all the damage was charged up to the drunk like he burned his mattress and bedclothes—he paid all.

Q. All right. We have that.

A. The record of that I guess you got.

Q. Well, now, did you perform any extra duties other than those of fireman while you were there?

A. Oh, yes, we had to help in riots and we had to help in clearing out ships when we had hurricane orders, when the flag went up, we had to get the ship cleared out and had the "Berkshire"—we had to have that cleared away—if everybody was sleeping there put off, loosen the lines and have everything ready in case the hurricane came.

You know, several times we had signs of hurricanes, but they never showed up.

Then in the barracks where everybody would be living and sleeping we had to get them all out of there and out—you know, in case if the hurricane came. That was extra. We never looked for any pay for that.

Every fire that was there we reported, every one was reported.

Q. Now, did you perform any duties other than these duties in connection with the clearing out of the barracks ship when hurricane warnings came?

A. No, no, only to keep our apparatus in condition.

Q. Did you or your firemen perform any mechanical or manual work in the construction of the project?

[fol. 53] A. No, only in the apparatus. Now, we had a 1000-gallon tank was there—we had operated a truck—you know, in case there was a fire any place that we had no water. Now, we had to operate that truck ourselves.

Q. You would keep your fire equipment including this tank or truck?

A. This wouldn't be a fire equipment, but we placed it there in the evening there for us to operate. We would

have to take wherever there would — a fire and use that thousand gallons of water.

Q. This was mounted on a fire truck?

A. Yes—well, we have to fill it up again.

Q. Well, that was a part of your fire equipment, wasn't it?

A. Well, it was part in a way, you see, but still it was work, a lot of work to it.

All I did was perform fire patrol, put out any fires and reported any hazards and made reports of everything that occurred during my tour of duty and the records is kept of that. All fire apparatus and equipment was kept ready for immediate use, all lights in the outlying section, oil, cleaned and lit at night time and put out in the morning; and all appliances on the outside right at the base was kept in condition too; like out in Fort Bell we had portable fire extinguishers there. We had to go down there and examine them and have them filled and have them repaired.

Q. Well, now, Mr. Connell, you must have done very well down there because there came a time when you got a promotion.

A. Well, I stayed on the job. It was very hard, you know, I was brought up—I had a lot of good eats out here and when I went down there I was short of water.

Q. We were talking about the promotion, Mr. Connell. You did get a promotion, didn't you?

A. I was promoted July 14th.

Q. And what were you promoted to?

A. But it took effect on the 19th. I didn't get paid from the 14th to the 19th. The 19th I think the pay started. I was made a Lieutenant.

Q. You were Lieutenant of the Fire Department?

A. Yes.

[fol. 54] Q. You were Lieutenant in charge, weren't you?

A. At night time.

Q. You had quite a lot of experience as a fireman, hadn't you?

A. Yes, sir.

Q. When was it you joined the New York City Fire Department?

A. July 1, 1913.

Q. And you had been——

A. (Interposing:) A firemen until June 11, 1941. Twenty-eight years except for a couple of days.

Q. Well, what experience, training and what ranks did you hold in the New York City Fire Department?

A. Well, I was assigned a fireman but not extinguishing fires. Then I was taken over by a Chief to assist him as Chief's Aide. I did clerical work and I carried out his orders to the companies no matter where they were in the buildings. I assisted him, and before I got out I was a Building Inspector. My chief was put out and so I went back as a Building Inspector for a couple of years, and then I retired.

Q. You had very extensive experience in the New York City Fire Department, did you not?

A. Yes.

Q. Is that right?

A. Yes.

Q. Now, when you became Lieutenant in charge of the Fire Department on the Bermuda base you got an increase of salary?

A. Yes, I got $90.25 a week.

Q. Your base salary was increased to about $76 and then you got overtime?

A. I received $76 per week as a Lieutenant plus time and a half for overtime between fifty-six hours per week and sixty-three hours per week, making a total of $90.25 a week which I received. We are not looking for any money that we were held on at all hours of the night and day to answer any alarms when we were not assigned to our posts.

Mr. Creel: It is stipulated by Mr. Bromberg that all firemen will not seek any compensation for hours worked per week over sixty-three.

[fol. 55] Mr. Bromberg: It is stipulated by Mr. Bromberg, as attorney for the plaintiffs, that no claim will be made by the firemen plaintiffs for compensation for the time they were required to stay on the base and be subject to emergency call, and that they will only demand compensation for those hours actually worked under an assignment.

By Mr. Creel:

Q. Now, as Lieutenant in charge, what were your duties?

A. Well, we had——

Q. (Interposing) First, who was your superior?

A. Captain Walsh.

Q. Were you in charge of a section or were you in charge of all sections?

A. All sections for the tour of duty.

Q. You were in direct charge under Captain Walsh?

A. Captain Walsh.

Q. Your Fire Department was broken into three sections?

A. Oh, no.

Q. I mean your tours of duty?

A. Yes, three sections.

Q. You were in three sections, weren't you?

A. No, there would be another man in charge. Now, I would go to work at 11 o'clock and stay on maybe to nine in the morning; from eleven to eight or from twelve to nine, whatever way, and there would be another man in charge and another man in charge. There were three Lieutenants and a Captain. There was one Lieutenant and a Captain working in the day tour.

We had a small truck with hose in it and we carried it, all appliances on it—you know, for fixing different things. Then, with that truck we visited all the sections. We went around to all sections and made inspections all hours during the night.

Q. Now who was in charge of the Fire Department?

A. I was, when I would be working in the night tour.

[fol. 56] Q. And your immediate superior was Captain Walsh?

A. Yes.

Q. Now, there were two other Fire Lieutenants?

A. Yes.

Q. Were you always in charge of the night tour?

A. I was always working night tours.

Q. And the other two Lieutenants would split the other two?

A. No, one of them worked from four to twelve, one of them was assigned day tour with the Captain, one of them worked four to twelve. I would work twelve to eight.

Q. Well, now, in the night tour you were always in charge?

A. I was always in charge.

Q. Captain Walsh would be off duty then?

A. He would be right in his quarters if I needed him to report anything to him.

Q. How many men did you have under your supervision?

A. Well, I used to have two in each section—that would be, I had six sections.

Q. You would have twelve men?

A. I would have twelve men, sometimes thirteen.

Q. Now, what would your duties be as Lieutenant in connection with these six sections?

A. Well, you see, I would be around in the car and I wouldn't tell them when I was coming,—you know, so I walked around the section to supervise them, see if they were on the post, well, I would visit that three and four times a night until morning, see whether they were on post all the time, see that nothing was wrong because there may be a little fire in the outlying section and I would have to bring a couple of men out there to put it out. Like we had a dump there, you know, regularly it would go on fire and the barracks was right across from us, you know, and they they would call up to know what was on fire and so we would have to stretch hose to put out the dumps.

Q. Your duties would be primarily to supervise the men that were under you in the various sections?

A. Yes.

Q. Would you have the power to recommend that men [fol. 57] under you that did good work get promoted?

A. Well, I made all my reports to the Captain on it, see?

Q. Well, would you in these reports ever recommend or censure a man or recommend a man?

A. No, I didn't do it, because the Captain knew his good men and he knew who weren't good. The Captain knew every one. He knew them for years, and who did their duty down there. I recommended them all the time as being good men, but I never made any false reports, because they all were on the job.

Q. Well, now, if you found a man neglecting his duty would it have been your duty to report him?

A. Well, it would.

Q. Did you ever have to report any man?

A. Well, I might. I didn't find any of them asleep, but if I thought they were sleeping or just waked up I might give them a calling.

Q. Did you ever have to report a man?

A. No, I never had to report anybody.

Q. You never did report anybody?

A. No, I reported some that I had a little trouble with. I made a report to Mr. Saunders when the Captain was away, some of them, you know—one of them wasn't taking orders from me, so I reported him to Mr. Saunders.

Q. What action was taken on your report?

A. Well, the Captain was back in the city and that time the other Lieutenant Brower was in charge so he referred it to Lieutenant Brower so it was all squashed, the fellow obeyed me after that.

Q. Now, what were your resposibilities when you were in charge of this night section?

A. I was responsible for all the fires, if there was any fires, for reporting the same and reporting anything that was wrong during the night. I would make a report, every morning I put it under the door in the Captain's room. I turned a report every morning in there.

[fol. 58] Q. Well, now, that requires the exercise of considerable judgment and discretion, didn't it?

A. Well, you had to go around—you know, fire duty. I was brought up to put out fires, you know, and any place that was hazards I knew all about them, you know, and I inspected them places often.

Q. Well, could one of the workmen down there perform your duties without your training and your knowledge and your judgment?

A. No.

Q. This would have required special training and knowledge?

A. Because there is extinguishers there that you had to know how to use, you know. C. O. 2 extinguishers, what to use them on, and Pyrene extinguishers, what to use them on, different things, you know. Now, we had different things like that, you know. You had to be a fireman and know how to use them because C. O. 2 is dangerous if you open it up and hit somebody with it, it would burn you the same as fire.

Q. Well, if a fire got started would it require some judgment and discretion as to know how to go about putting it out?

A. Oh, yes. You would have to know what kind of apparatus you would need, you would have to know whether you get the pumpers or the portable extinguishers or what

you would get there, or the thousand-gallon tank, to get that there. Maybe that would be able to put it out, and then you get the pumpers brought up there and pumpers brought down to the ocean and stretched from there. It depends. Now, look, when we had a fire in the barracks we had to protect the other barracks. We have to have lines there stretched for the other barracks that they don't go on fire.

Q. Did you have any assistants when you were in charge of the fire section at night?

A. Only the Captain, he was always there in the section.

Q. Well, he of course was your immediate superior?

A. Yes, but any time anything went wrong I went in to him, woke him up or any telephone calls or anything wrong I would bring him with me. You see, we were on duty all [fol. 59] the time. No matter when anything was wrong everybody would be notified and we had to report. That is the reason they didn't allow us to live off St. David Island.

Q. Didn't you live at the St. George Hotel?

A. Oh, no. I couldn't get off the island. I had to live right in the "Berkshire". I lived the whole twenty months in the "Berkshire". Some of them got so nervous, you see, that they begged the Captain—they had to go home because you could not sleep in the day time or night time in the "Berkshire" half the time.

Q. Now, would you instruct your men how to do their job, make recommendations as to what equipment to use, and how to go about their job?

A. Well, they all knew it, they were all retired firemen. They had the whole thing there. They knew how, they all knew where to start the water, to stretch and everything else, they were all retired firemen so they all knew what to do.

Q. Would you ever make any recommendation as to the equipment that was to be obtained?

A. Well, no. That was up to the Captain.

Q. Now, you had how many sections under you?

A. Well, we had Saunder City—no, Poole City. Then we had White City, then we had Long Bird, the Industrial Area and the "Berkshire". That is where the men were assigned; we had the fields, the crash wagon in the fields, and the planes coming in and leaving, in the day time.

Q. Now, at night when you were to assign your men to these various stations or sections it would be you who would assign them?

A. No, the Captain had assigned six men in each section. They had to sleep and live there. Now, in Saunder City when we had that amount of men there would be six men assigned there. They slept there, they didn't leave there at all. That would be two in each group, you know. Poole City, the same way. White City, the same way. They didn't move around at all. They stayed in that section. In the "Berkshire", the same way, Industrial Area, and [fol. 60] where they had to guard that section. He assigned every one of them. Men worked and they changed around in different groups in sections at night time like they worked one—seven days at eight o'clock, another day twelve o'clock, another day four.

Q. You didn't set their watches then?

A. No, they did it themselves. The Captain did it.

Q. The Captain did it?

A. Yes.

Q. And your duties would then be to do what as Lieutenant in charge?

A. Well, I would go out when I would make an inspection, I would put every one of their names and numbers down, see? And I would go and see that every one of them was in the job. Well, then, when the Government checker went around he always came to me last and we would re-check to see if he had gotten the right numbers, see? So they were always checked on the job.

The Government checker went out during the night. You would never know when he was coming—any time from one o'clock to six o'clock in the morning. He went around to every section and he checked them on the job.

Q. That was a time checker?

A. The time checker.

Q. But your duties were to supervise the various men in the sections, under you?

A. To stay on their posts.

Q. Did you have any central place where you would receive notice or call of a fire?

A. Yes, at the Industrial Area. There was barracks there. They used to call it the White Collar Barracks. There was barracks there. The Captain had the telephone. He had a telephone in there.

Q. Would that be your station and post of duty when you were in charge at night?

A. Well, I would be right outside on the street. The wagon would be there, because if any of them found a fire or anything he would call up that telephone, the Captain would get it. He would come right out and we would pick up a couple more men and we would go to that section, we would pick up all the men we could to go there. They would [fol. 61] notify him on the phone. That was the only phone there at night time.

Q. If it were at night would they notify him or would they notify you?

A. They would notify him because I would be stationed around there when I wasn't out making supervision out around, supervising the men.

Q. Could a regular run-of-the-mill employee down there have performed your work without your special training and instructions?

A. No, we had two young fellows assigned to us in the day time as chauffeurs and helpers. Both of them was $90 a week boys—nineteen and twenty-one—$90 a week as Euclid drivers—them big Euclids. They used to call them Uke drivers—big trucks. They were $90 a week. They were assisting us there until we got some firemen down there.

Q. Did you instruct these men how to perform their duties?

A. Yes, how to fill extinguishers, operate everything, and we broke in a lot of men there—you know, but they were going back just as fast as we broke them in how to assist us, how to start the pumps, how to draft water, how to use the lines and everything else. We did the same, we had fire drills in the "Berkshire", got them out all hours of the night to see if they could get out in case of fire.

Q. Captain Walsh, he would be asleep at night time? He was on duty at the day time?

A. Yes, sir. Well, he used to be out supervising too, you know, but night time—many a night any hour of the night he would walk out, get out of bed and walk out with me, and say, "Come on, we will take a drive around." You never know when he come out of his room and say, "All right, we are making an inspection, look around and see how everything is." He stayed on duty all the time.

Q. Well, he slept at night, didn't he? You were in charge at night, weren't you?

A. Yes, but you never know when he walked out of his room. You could figure that he would walk out of his room any minute.

[fol. 62] Q. At night who was supervising, was it you or was it the Captain?

A. Me, and in case anything was wrong I would notify the Captain.

Cross-examination.

By Mr. Bromberg:

Q. Mr. Connell, what were your duties and the duties of the firemen employed by the Bermuda Base Contractors with respect to the materials and equipment on the job?

A. Well, all the material that was down there we had to keep guard over them in case of fire, and when they were putting them on them floats there with the derrick—used to be lifting all this material on floats—whenever they took it we had to watch because once in a while there was a little fire there and if there was any little fire around there we had to watch them. Now, like one of the boats used to transport them back and forth from St. George to St. David's Island that went on fire one morning coming across we had to put it out. We had to watch all materials there and guard it against fire.

Q. Did you observe whether or not this material was being loaded for shipment outside of the base or was it solely for use at the base?

A. Oh, some of it was because where a convoy was on the outside there any ships that had cargo on it shifted, it came into Bermuda, into St. David's Island there to have it fixed up. Now, they would have to take off maybe all the material that was on—trucks and everything else and re-load it again.

Now, sometimes they couldn't put back them trucks there again and they had to leave them there until they returned again. Now, I never knew where they went to, nobody else did down there. When the cargo shifted at all they brought the men there, they brought them in there to have it straightened out and the Bermuda men that did straighten it out took the material off and re-loaded it again.

[fol. 63] Q. Did you observe whether or not any equipment or materials that had been used at Bermuda base was ever shipped away from Bermuda base?

A. Oh, yes. There was; all that stuff was dismantled there, crated and put in to floats and taken away.

Q. It was part of your duties and the duties of the other firemen to guard these materials and this equipment?

A. We had to inspect it every so often at night and day. We had to inspect all them places where they were crated up on the Industrial Area.

Redirect examination.

By Mr. Creel:

Q. Mr. Connell, neither you nor any of the other firemen ever assisted in the loading or unloading of a ship?

A. No, no. We only just watched it.

Q. Did you perform any duties aboard ships?

A. No.

Q. Other than the "Berkshire", the barracks ship?

A. No. We were called over to one ship—I forget the name of it—it was in the St. George—in the pier there—we were called over there one night and I don't know whether I didn't do any work there—whether some of the other men did or not. By the time we got over there there was a fire burning in one of them ships for three or four hours—only just smoke was all I saw. When I got over there we were only a short time there, we came home. I did not do any work there. I won't say whether any of the other fellows did any work there or not.

Q. And you never performed any duties aboard any of these ships where cargo was being shifted?

A. No, I just watched them. We had line stretched to pump her out there, a line stretched in case anything did happen.

Q. Where were your lines, ashore?

A. Well, we used to take those pumpers right to the shore and draft water and stretch the line. Now, in case anything started all we had to do was start the motor.

[fol. 64] Q. Where was the ship?

A. Right there in St. David's Island where they used to be bringing that stuff into floats—the derricks would be loading that stuff into floats.

Q. The ships couldn't approach St. David's Island within any range where your equipment could reach it, could they?

A. No, not there, but over on the pier it could, over on St. George.

Q. Did you ever go over with your equipment to a ship in St. George and fight a fire?

A. I didn't do any duty there. I went over there—there was a fire on one of them ships—it was in there but I didn't do any duty. The only time we did any duty was at St. George's Hotel. We were called over there one night and St. George's Fire Department was there.

Q. Well, so far as you know, did any other of the firemen ever perform any duties in extinguishing a fire on a ship, so far as you know? Do you know of any such?

A. No, no.

Q. Isn't it probable that you had heard of a fire aboard of a ship in which you men took part in?

A. The only fire duties we did aboardship was in connection with the ferryboat that was used to transport materials, equipment and men from St. George to St. David's Island.

(Whereupon, at 12:10 P. M., this Deposition closed.)

John Joseph Connell.

(Subscribed and sworn to before me this 10th day of August, 1946.) Jacob Bromberg, Attorney & Counselor-at-Law, Office and Post Office Address: 225 Broadway, New York City. Residing in Kings Co. Clk: 8810, Reg. No. A282-B-8, N. Y. Co. Clk's No. 40, Reg. No. A-336-B-8, Queens Co. Clk's No. 54, Reg. No. A-468-B-8. Notary Term expires March 30, 1948.

[fol. 65] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF DAVID JOSEPH TOWNSEND, READ IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK,
County of New York, ss:

David Joseph Townsend being duly sworn, deposes and says:

I am one of the plaintiffs above-named and am fully familiar with all the facts and circumstances surrounding our cause of action herein. I am fully acquainted with all the work done by all the plaintiffs in this action and make this affidavit in opposition to the defendant's motion for summary judgment on behalf of all of us. Mr. Robert Glenn, the supervisor in charge of the project, on behalf of the defendants in his affidavit in support of this motion did not fully state or describe the full extent of the work performed by the plaintiffs.

[fol. 66] The plaintiffs were not engaged in merely "Local" policemen and firemen activities as contended by the defendants. A substantial part of the activities of the plaintiffs was directly concerned and connected with the movement of goods moving and produced in commerce, which "goods" came from the States and part of which went from Bermuda to other places unknown to the plaintiffs.

The plaintiffs were all hired under similar contracts and worked for the defendants during the years 1941, 1942 and 1943. That at the time the plaintiffs were hired they received a contract from the defendants stating that they would be paid a certain sum per week. After the execution of the contract, each of us received a mimeographed sheet of paper explaining what we had to do and which also stated that our work week would be 48 hours per week. When we got down to Bermuda, we were told that we would be required to work 8 hours per day, 56 hours per week and would be paid time and a half for each hour over 8 hours of any one day.

We were not hired to guard and protect pieces of construction work or merely the materials which went into such

construction. There was little danger of construction work being stolen or vandalized.

A substantial part of our duties as firemen and patrolmen was to protect the enormous quantities of merchandise, goods, vehicles, materials, tools and equipment being loaded and unloaded from ships docked at St. George and Hamilton, Bermuda, being transported to and from said dock to the bases being constructed by the defendants; guard and protect at the bases, some for use in the construction work, others to be reshipped or reassembled for reshipment elsewhere and some to be delivered to the commissary conducted by the defendants, where goods of every conceivable description were sold to the population, which included employees of the defendants and natives of Bermuda. Included in this vast amount of materials, etc. were thousands [fol. 67] of crates of materials, equipment, etc., which were never opened but were reshipped to other places. These unopened crates were guarded and protected both at the base and at the docks. It was one of our most important duties to watch these original crates and equipment which were awaiting reshipment, sometimes by reshipment upon the same vessel that brought the merchandise or on other ships that came later. Because of wartime conditions, none of us were aware of the places the said merchandise, equipment, etc. was shipped.

The defendants, in addition to the construction of the bases, operated commissaries, where enormous quantities of merchandise were sold. It was part of our duty to patrol and protect merchandise being delivered to the commissaries and while in the commissaries.

Those of us who were patrolmen guarded these materials and equipment against theft and vandalism and those of us who were firemen guarded these materials and equipment against danger from fire.

Our posts of duty changed constantly. When a ship came in some of us were directed to the docks and remained until the ship was unloaded, similarly when a ship was loaded. Some of us when we came to Bermuda and when we left Bermuda, were directed to patrol and guard merchandise and equipment belonging to the defendants located on the ships. This work on board ship was not done under the direction of any ship officers to the knowledge of any of us, but were directed by orders from our own immediate supervisors in

the employment of the defendants. We guarded their merchandise which was being sent to Bermuda, or as the case may have been, returned to the States. We understood this to be a part of our employment with the defendants.

None of the plaintiffs could under any stretch of the imagination be classified as executives. We had no power of management. We all took orders whether we were ordinary patrolmen, sergeants, or lieutenants. We could not [fol. 68] hire or fire. We had the responsibility to carry into effect directives and orders given to us by the captain who in turn took orders from his superior. Our work was always checked and supervised by others. Even those of us who had the title of sergeant or lieutenant were required to do similar work as ordinary patrolmen and a substantial part of our time was spent in such work.

David Joseph Townsend.

(Sworn to the 20th day of September, 1946.)

In United States District Court

[Title omitted]

Affidavit of John Joseph Connell, Read in Opposition to Motion for Summary Judgment

[fol. 69] State of New York,
County of New York, ss:

John Joseph Connell being duly sworn says:

I am one of the above named plaintiffs. I have read the foregoing affidavit of David Joseph Townsend, I aver that the statements therein stated are correct and desire to add the following additional facts.

A great deal of supplies and equipment was crated at the bases, transferred to floats which were towed from the barges to St. George for shipment to the United States and possibly elsewhere. As part of our duties we guarded and watched these supplies being shipped, which also included motor trucks, bull-dozers and other types of vehicles.

John Joseph Connell.

(Sworn to the 20th day of September, 1946.)

[fol. 70] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JACOB BROMBERG, READ IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK,
County of New York, ss:

Jacob Bromberg being duly sworn says:

I am the attorney for the plaintiffs in this action.

Due to the fact that the plaintiffs reside out of the City of New York or are temporarily away from the City I have been unable to obtain affidavits from each one of them in opposition to the defendants motion for Summary Judgment.

I have however, on numerous occasions interviewed each plaintiff and am fully acquainted with all the facts of their respective claims. By reason of these personal interviews the data in my files and my own independent investigation I am able to state that the causes of action of all the plaintiffs are substantially alike and that if they were available [fol. 71] they would make similar affidavits in opposition to this motion as have been made by David J. Townsend and John J. Connell, with little if any variance.

Defendant's attorneys in the affidavit of J. Randall Creel submitted in support of their motion refer to correspondence had with the Departments of State and Interior of the United States Government which is obviously intended to convey the impression to this court that the areas leased by our government in Bermuda are United States possessions. In this connection it is important to bring to the attention of this court another inquiry seemingly made by the attorneys for the defendants herein directed to the Wage and Hour and Public Contracts Divisions of the United States Government. I say seemingly, because the answer given to this inquiry which is dated May 21, 1946 involves a specific reference to the Bermuda bases which are involved in the case at bar and is directed to a firm of attorneys. Regardless whether the attorneys for these defendants made the inquiry or not it is important to bring this inquiry to this court's attention to be considered with the letters from the

State Department. This inquiry and answer appears in 1946 Wage and Hour Cases at page 1276:

"Question: Does the Fair Labor Standard Act apply to employment on construction of Army and Navy bases in territories this government has leased from the British? Our problem specifically pertains to employees working at American installations in Bermuda known as Fort Bell and Kindley Field.

"Answer (Deputy Administrator): As you know, the Act covers employees 'engaged in commerce or in the production of goods for commerce' Section 3(b) defines 'commerce' as 'trade, commerce, transportation, transmission or communication among the several States or from any State to any place outside thereof', [fol. 72] and in Section (3) 'State' is defined as 'any State of the United States in the District of Columbia or any territory or possession of the United States.'

"An examination of the legislative history of the Act relative to the meaning of the phrase 'territory or possession of the United States' does not reveal anything pertinent to the instant problem. Since these bases were secured from the British subsequent to the passage of the Act, the particular problem under consideration did not then exist.

State of the United States in the District of Columbia or any territory or possession of the United States.'

"Apparently, the only two decisions having any bearing on the decisions having any bearing on the question are Felardo v. Foley Bros., 45 N. Y. Supp. (2) 262 (New York Supreme Court, special term) and Eckert v. Elmhurst Construction Company, 56 N. Y. Supp. (2d) 98 (New York City Court trial term), both cited in the latter letter from your firm. The Eckert case, involving an employee working at an American Naval base at British Guiana, appears to be on all fours with your situation. The base where he worked was established under the same general agreement with the British as the bases in Bermuda, giving the United States a 99 year lease. See 55 Statutes at Large, Vol. 2, page 1560 et seq. In the Eckert case the court held that the base where plaintiff worked was a temporary 'possession of the United States' within the meaning of Section 3(c) of the Fair Labor Standards Act and

that he came within its coverage. On the other hand, I do not believe the Felardo case is directly in point; the plaintiff, who was held not to be covered by the Act, worked on buildings, equipment and bases in Iran, with nothing being offered to show that the United States [fol. 73] had any special long-term leases there. It should also be pointed out that the three interpretations of the Wage and Hour and Public Contracts Divisions to which the court referred in support of its decision pertained to the employees who, though working in foreign countries, were not employed at bases leased by this country.

"State Department officials who were consulted regarding the problem you presented, indicated that thus far the United States Government has not made any claim that the base secured from the British are possessions of this country and that the State Department has not made any ruling or issued any interpretations pertaining to the matter.

"I believe that a determination regarding the status of these leased lands lies outside the province of the Wage and Hour and Public Contracts Divisions, and until the question has been settled by court decisions, congressional or executive acts, or interpretations issued by the State Department or other proper governmental agencies, the Divisions are not in a position to assert whether the Fair Labor Standards Act applies to employees at bases leased from the British.

"I regret that the nature of your problem is such that I cannot give you a more definite answer. * * *"

At the argument of the motion I will present to the Court a printed copy of the Agreement relating to the leased areas entered into between Great Britain and the United States, which it is submitted shows that the bases so acquired by the United States are temporarily possessions of the United States over which our government has full sovereign and possession rights reserving however, the right to British vessels to trade with the areas leased.

[fol. 74] Upon the trial of this action the evidence of each plaintiff will prove that a substantial part of each day's work was to guard and to protect enormous supplies of goods, merchandise, tools, equipment and materials in commerce.

Wherefore, plaintiffs pray that the defendants' motion for summary judgment be denied with costs.

Jacob Bromberg.

(Sworn to the 23rd day of September, 1946.)

IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENTAL AFFIDAVIT OF JAMES RANDALL CREEL, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

[fol. 75] STATE OF NEW YORK,
County of New York, ss:

JAMES RANDALL CREEL, being duly sworn, deposes and says:

Subsequent to the service of the defendants' notice of motion for summary judgment on September 3rd, 1946, the plaintiffs served, by mail, a sworn denial in reply to defendants' requests for admissions heretofore served upon the plaintiffs on July 23rd, 1946.

Although the plaintiffs' service of such sworn denial was not timely, the defendants' attorneys have nonetheless given the plaintiffs a due and timely service of such sworn denial.

The plaintiffs' sworn denial so served does not alter any of the three basic facts upon which this motion for summary judgment is based, i.e., it has not been denied that:

1. The duties performed by the plaintiffs were the furnishing of police and fire protection to the original construction work being performed by the defendants in the Island of Bermuda (Requests for Admissions Nos. 2 and 3).

2. The construction work performed by the defendants in the Island of Bermuda was original construction and no part thereof was reconstruction or repair (Requests for Admissions, No. 4).

3. While it is denied that the plaintiffs performed all of their duties in the leased area of Bermuda, the plaintiffs' sworn denial does admit that all such duties were performed either in (a) "the City of St. George on St. David's Island";

(b) "in the navigable waters around Bermuda and St. [fol. 76] David's Island", as well as (c) in the leased areas of the Island of Bermuda.

Hence, it is admitted that all of the duties of the plaintiffs were performed in the area immediately adjacent to the Island of Bermuda.

Therefore, the sworn denial served by the plaintiffs in no way denies any of the basic facts upon which this motion for summary judgment is based.

Upon these uncontroverted facts, it is contended by the defendants that they are entitled to summary judgment as a matter of law, upon the following grounds:

First: The Fair Labor Standards Act does not apply to employment in the Bermuda area.

Second: The furnishing of police and fire protection to original construction work is "local" and is not covered by the Fair Labor Standards Act.

Third: As appears from the admissions in their depositions on file herein, the plaintiffs John Joseph Connell and David Joseph Townsend are exempt from the provisions of the Fair Labor Standards Act as administrative and executive employees.

Not only does the sworn denial of the plaintiffs not contravert any of the basic facts but indeed suggests another and different ground for granting this motion for summary judgment, for insofar as the plaintiffs state their duties were performed on "ferry boats, tugs and other vessels in the navigable waters around Bermuda and St. David's Island", another exemption clause of the Fair Labor Standards Act is involved, namely, Section 213(a)(3), Title 29, which exempts seamen and those performing duties of seamen. If the plaintiffs were, in fact, performing the duties of their employment aboard ferry boats, tugs and other vessels (a fact which the defendants' proof will contradict), [fol. 77] they were performing duties of seamen and hence are exempt from the provisions of the Fair Labor Standards Act. (Gale v. the Union Bag & Paper Corporation, 30 Fed. Supp. 647, affirmed 116 Fed. (2nd) 27, Certiorari denied 313 U. S. 559, 85 L. Ed. 1519, 61 S. Ct. 837.)

James Randall Creel.

(Sworn to the 3rd day of September, 1946.)

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOHN JOSEPH CONNELL, EUGENE T. FITZPATRICK, WILLIAM L. FLANAGAN, Joseph John Gilroy, John Joseph Mortimer, James F. McDonald, Paul F. Nieter, William H. Parker, Jr., Louis August Rehberg, Howard L. Shock, Jr., and David Joseph Townsend, Plaintiffs,

—against—

VERMILYA-BROWN COMPANY, INC., NECARO COMPANY, INC., and The Arthur A. Johnson Corp., doing business as Bermuda Base Contractors, Defendants

Civil Action 34-733

[fol. 78] Appearances: Jacob Bromberg, Esq., Attorney for Plaintiffs (N. Y. City); Sol L. Firstenberg, Esq., of Counsel.

Messrs. Eidlitz, French, Fink and Markle, Attorneys for Defendants (N. Y. City); James Randall Creel, Esq., of Counsel.

OPINION

COXE, D.J.:

This is a motion by the defendants for summary judgment in their favor.

The action is brought by eleven former employees of the defendants for additional overtime compensation, liquidated damages, and an attorney's fee, under the Fair Labor Standards Act of 1938 (29 U. S. C. A. § 201, et seq.).

The defendants were jointly engaged in the construction of an Outlying Defense Base, known as Fort Bell and Kindley Field, in the Bermuda Islands, under a cost-plus-a-fixed fee contract entered into with the United States (by Lt. Col. J. D. Arthur, Corps of Engineers, United States Army), dated February 4, 1941. This construction work was being performed exclusively in areas leased to the United States for ninety-nine years pursuant to an executive agreement between the United States and British governments, dated March 27, 1941, providing for the leasing to the United States of various areas, including areas in the Bermuda Islands, for the establishment of naval and air bases. (See 55 Stats., Part 2, pp. 1560-1591.)

The plaintiffs were employed by the defendants at different times during the period from September 1941 to the middle of 1943 in connection with the construction of this Defense Base, and all of the work for which the plaintiffs are now asking overtime compensation was performed in Bermuda and directly concerned with such construction. [fol. 79] Seven of the plaintiffs were employed as patrolmen and acted as policemen in the leased areas; the other four plaintiffs were employed as fire patrolmen and acted as firemen in the same areas. During the course of their employment, one of the plaintiffs, who had been employed as a patrolman, was promoted to be a "sergeant of police", and another of the plaintiffs, who had been employed as a fire patrolman, was promoted to be a "lieutenant" of the fire department.

The defendants make three contentions in support of the motion, namely, (1) that the Fair Labor Standards Act has no application to the employment of the plaintiffs in the leased areas of Bermuda, (2) that the plaintiffs were engaged in work of original construction, and were, therefore, not covered by the Act, and (3) that two of the plaintiffs are exempt from the provisions of the Act as executive and administrative employees.

The Fair Labor Standards Act has no application to the employment of the plaintiffs in the leased areas of Bermuda. This Act, in Section 206 and 207, provides for minimum wages and maximum hours for employees "engaged in commerce or in the production of goods for commerce" (29 U. S. C. A. §§ 206(a) and 207(a)). Section 203(b) defines "commerce" as meaning "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof", and Section 203(c) defines State as meaning "any State of the United States or the District of Columbia or any Territory or possession of the United States" (29 U. S. C. A. § 203(b) and (c)).

None of the leased areas of Bermuda in which the construction work of the defendants was being performed was a "Territory or possession of the United States" within the meaning of the language of the Fair Labor Standards Act. The plaintiffs make no contention that any of these leased areas is a "Territory" of the United States, but they insist [fol. 80] that such areas are possessions of the United

States. Whether they are possessions of the United States depends on whether they are within the sovereign jurisdiction of the United States. That is a political question to be determined by the legislative and executive departments of the government, and not by the courts. *Jones* v. *United States*, 137 U. S. 202, 212; *Pearcy* v. *Stranahan*, 205 U. S. 257, 265.

The legislative and executive departments of the government have clearly indicated that these leased areas are not within the sovereign jurisdiction of the United States. In 1940, while the negotiations for the leased areas were in progress, Attorney General Jackson rendered a formal opinion to the President regarding the proposed executive agreement with Great Britain, in which he stated as follows:

> "The privilege of maintaining such bases is subject only to limitations necessary to reconcile United States use *with the sovereignty retained by Great Britain.* Our Government assumes no responsibility for civil administration of any territory * * *". (39. Op. A. G., 484,485).

Moreover, the State Department, in a letter to the attorneys for the defendants, dated June 20, 1946, has advised that "this Government has not made any claim that the bases in Bermuda are territories or possessions of the United States". And in a recent Statute (Act of March 22, 1943, 57 Stat. 41, 34 U. S. C. A. Sec. 1201), the Congress has indicated that it regarded leased areas as without the territorial jurisdiction of the United States. This statute extended the jurisdiction of naval courts martial to civilian employees and others at naval bases and air stations "within an area leased by the United States *which is without the territorial jurisdiction thereof.*"

[fol. 81] The only case cited by counsel in which the precise question now raised was adjudicated is *Eckert* v. *Elmhurst Contr. Co.*, decided by the New York City Court, July 10, 1945, (185 Misc. 108) and affirmed without opinion by the Supreme Court Appellate Term (186 Misc. 100). This was a suit brought under the Fair Labor Standards Act by an employee at a naval and air base in British Guiana in one of the areas leased to the United States under the same ex-

ecutive agreement involved in the present case. The court held on an analysis of the executive agreement that the leased area was a temporary possession of the United States, and that therefore the plaintiff was within the coverage of the Fair Labor Standards Act. I think that this ruling is contrary to well-established law because it assumes to decide the political question of sovereignty, which is not for the courts to determine.

With this determination it is unnecessary to pass on the other contentions of the defendant.

The motion of the defendants for summary judgment dismissing the complaint is granted.

October 19, 1946.

Alfred C. Coxe; U. S. D. J.

[fol. 82] In United States District Court for the Southern District of New York

(Civil Action 34-733)

John Joseph Connell, Eugene T. Fitzpatrick, William L. Flanagan, Joseph John Gilroy, John Joseph Mortimer, James F. McDonald, Paul F. Nieter, William H. Parker, Jr., Louis August Rehberg, Howard L. Shock, Jr. and David Joseph Townsend, Plaintiffs,

against

Vermilya-Brown Company, Inc., Necaro Company, Inc. and The Arthur A. Johnson, Corp., Doing Business as Bermuda Base Contractors, Defendants

Judgment on Order

A motion having been made by the defendants herein for summary judgment in their favor pursuant to the provisions of Rule 56 of the Rules of Civil Procedure for the District Courts of the United States and the said motion having been regularly brought on for argument before the Honorable Alfred C. Coxe, U. S. D. J. at the Motion Term of this Court on the 25th day of September, 1946 and the parties having duly appeared by their attorneys; after hearing Eidlitz, French, Fink and Markle, attorneys for all defendants, James Randall Creel, of counsel, on behalf of said motion, and Jacob Bromberg, attorney for all plaintiffs,

Solomon L. Firstenberg of counsel, in opposition thereto, and due deliberation having been had, and the Court having [fol. 83] duly made and filed its written opinion on the 21st day of October, 1946, directing judgment dismissing the complaint,

Now, on motion of Eidlitz, French, Fink and Markle, attorneys for the defendants, it is

Ordered, Adjudged and Decreed that the plaintiffs' complaint in the above entitled action be, and the same hereby is, dismissed upon the merits.

Dated: New York, November 1st, 1946.

Approved:

Alfred C. Coxe, U. S. D. J.

Judgment Rendered. William V. Connell, Clerk. Nov. 1, 1946.

[fol. 84] In United States District Court

[Title omitted]

Notice of Appeal

Sirs:

Please take notice that the Plaintiffs, John Joseph Connell, Eugene T. Fitzpatrick, William L. Flanagan, Joseph John Gilroy, John Joseph Mortimer, James F. McDonald, Paul F. Nieter, William H. Parker, Jr., Louis August Rehberg, Howard L. Shock, Jr. and David Joseph Townsend, above named, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit, from the judgment of the United States District Court, Southern District of New York, rendered and filed in the Office of the Clerk of said Court, on November 1st, 1946, dismissing the Plaintiff's complaint on the merits and the said Plaintiffs' appeal from each and every part of said judgment as well as from the whole thereof.

[fol. 85] Please take further notice that Appellants intend to bring up for review on such appeal, the decision of the Court dated October 19, 1946, granting said judgment.

Dated, New York, N. Y., December 17, 1946.

Yours, etc., Jacob Bromberg, Attorney for Plaintiffs, Office and P. O. Address, 225 Broadway, New York 7, N. W.

To: Eidlitz, French, Fink & Markle, Esqs., Attorneys for Defendants, 110 East 42nd Street, New York 17, N. Y.

——, Clerk, United States District Court, Southern District of New York,

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[fol. 86] In United States District Court

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true and correct transcript of the record of the said District Court in the above entitled action, as agreed on by the parties.

Dated, New York, April 25, 1947.

Jacob Bromberg, Attorney for Plaintiffs-Appellants.
Eidlitz, French, Fink and Markle, Attorneys for Defendants-Appellees.

[fol. 87] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 88] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1947

No. 51

(Argued October 17, 1947. Decided November 28, 1947)

Docket No. 20717

JOHN JOSEPH CONNELL et al., Plaintiffs-Appellants,

v.

VERMILYA-BROWN COMPANY, INC., et al., Defendants-Appellees

Before: Augustus N. Hand, Clark and Frank, Circuit Judges

Appeal from the District Court of the United States for the Southern District of New York.

Action by John Joseph Connell and ten others against Vermilya-Brown Company, Inc., Necaro Company, Inc., and The Arthur A. Johnson Corp., doing business as Bermuda Base Contractors, for additional overtime compensation, liquidated damages, and an attorney's fee under the Fair Labor Standards Act, 29 U. S. C. A. §201 *et seq.*, brought to the Supreme Court of New York and removed by the defendants to the court below. From a summary [fol. 89] judgment for defendants, the plaintiffs appeal. Reversed and remanded.

Sol L. Firstenberg, of New York City (Jacob Bromberg, of New York City, on the brief), for plaintiffs-appellants.

James Randall Creel, of New York City (Eidlitz, French, Fink & Markle, of New York City, on the brief), for defendants-appellees.

CLARK, Circuit Judge:

This appeal presents the interesting question whether or not the Fair Labor Standards Act, 29 U. S. C. A. §201 *et seq.*, applies to work done on an Outlying Defense Base in Bermuda obtained by the United States under a 99-year lease and executive agreement with the British Government on March 27, 1941. Defendants were engaged in a joint venture for the construction of such a base, now

known as Fort Bell and Kindley Field, under a contract with the United States made February 4, 1941. Plaintiffs are eleven former employees of defendants seeking the benefits of the Act. Decision has gone against them below on summary judgment, and they now appeal.

Plaintiffs were hired in New York and were employed by defendants at different times during the period from September, 1941, to the middle of 1943 in connection with the construction of this Defense Base. All of the work for which they seek overtime compensation was performed in Bermuda. Seven of them were employed as patrolmen and acted as policemen in the leased areas; the other four were employed as fire patrolmen and acted as firemen in [fol. 90] the same areas. The affidavit of plaintiff David Joseph Townsend, supported by the affidavit of plaintiff John Joseph Connell, describes the character of the work in which all the plaintiffs were engaged. Townsend avers that a substantial part of their duties was to protect materials unloaded from ships docked in St. George and Hamilton, Bermuda. Included in such materials were crates that were never opened, but were reshipped to other places. He did not know their ultimate destination. Because of wartime conditions he was unaware of the places to which the materials were shipped.

The obligations defined by the Act are required of every employer for the benefit of each of his employees "who is engaged in commerce or in the production of goods for commerce," 29 U. S. C. A. §§206, 207, with certain exemptions not here pertinent stated in §213. "Commerce" is defined to mean "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof"; while "'State' means any State of the United States or the District of Columbia or any Territory or possession of the United States." §203(b) and (c). The district court ruled that none of the leased areas of Bermuda where the construction work of the defendants was being performed was a "Territory or possession of the United States" within the meaning of the Act. Our question is therefore as to the correctness of this ruling and specifically whether or not the leased area is a "possession" within the statutory meaning.

Initially we must ascertain the nature and extent of the transfer of interest made by the Government of the United

Kingdom of Great Britain and Northern Ireland to this country in the Agreement and Lease, as set forth in 55 Stat. Pt. 2, 1560-1594. The Lease itself refers to notes [fol. 91] previously exchanged for the grant "of the lease of naval and air bases and facilities connected therewith, in certain localities," and then provides for the demise to the United States of America of "all that property described in the Schedule hereto and delineated on the plan annexed hereto" for a term of 99 years, with the "rights, powers and authority and on the terms and conditions" stated in the contemporaneous Agreement, which "shall be regarded as incorporated in and made part of this lease." 55 Stat. Pt. 2, 1577.

The Agreement is therefore the important document for our purposes. This provides initially as a "General Description of Rights": "The United States shall have all the rights, power and authority within the Leased Areas which are necessary for the establishment, use, operation and defence thereof, or appropriate for their control, and all the rights, power and authority within the limits of territorial waters and air spaces adjacent to, or in the vicinity of, the Leased Areas, which are necessary to provide access to and defence of the Leased Areas, or appropriate for control thereof." Art I(1), 55 Stat. Pt. 2, 1560. It then continues with the enumeration of certain specific "rights, power and authority" included "inter alia," such as "(a) to construct (including dredging and filling), maintain, operate, use, occupy and control the said Bases," and "(d) to regulate and control within the Leased Areas all communications within, to and from the areas leased." 55 Stat. Pt. 2, 1561.

Other provisions also serve to show the nature of the grant. Thus the United States is given the "absolute right" to assume and exercise jurisdiction of all offenses within a leased area, by a British subject "apprehended therein," and by any other person, without restriction, with provision for surrender of offenders to the appro- [fol. 92] priate authority of the Territory if the United States so elects, Art. IV(1, 2), and for surrender of offenders to the United States authorities where they are within the Territory, but outside the leased areas, Art. VIII. The immigration laws of the territory adjacent to the bases do not apply to the leased areas, Art. XIII. United States postal facilities are to be established in the leased areas,

Art. XVI. No person in the leased areas serving or employed there can be subject to income tax or poll tax of the territory adjacent to the bases, Art. XVII. The leased areas are to revert to the "Lessor" only when abandoned by the United States with "notice" of such abandonment, Art. XXI. And Art. XXIV, significantly entitled "Possession," provides: "On the signing of this Agreement, leases of the Leased Areas, substantially in the forms respectively set out in Annex II hereto, shall be forthwith executed, and all rights, power, authority and control under such leases and under this Agreement (including transfer of possession where it shall not previously have been transferred) shall thereupon become effective immediately, and pending execution of such Leases they may be exercised *ad interim* and possession of the Leased Areas shall be immediately given so far as the location thereof is then ascertained. Where the precise location of a portion of any Leased Area is not ascertainable until more detailed descriptions are available, possession of such portion shall be given as rapidly as possible." 55 Stat. Pt. 2, 1569.

The Agreement does not specifically declare the leased areas to be part of the territory of the United States. It does contain, however, the following interesting negative provision: "It is understood that a Leased Area is not a part of the territory of the United States for the purpose of coastwise shipping laws so as to exclude British vessels from trade between the United States and the Leased Areas." Art. XI(4), 55 Stat. Pt. 2, 1565.

[fol. 93] The cumulative effect of these various provisions compels the conclusion that the areas are subject to fully as complete control by the United States as obtains in other areas long known as "possessions" of the United States. Thus, Title 48 of the United States Code entitled, "Territories and Insular Possessions," includes laws relating to such diverse areas as the Philippine Islands, §1001 *et seq.* (compare usage in the Supreme Court, *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 672-674, 678, 680); the islands upon which guano is discovered, §§1411-1419; and Swains Island, Tutuila, Manua, and other Samoan islands, and Guam, §§1431, 1431a, 1432, 1433, with all the diverse governments and degrees of sovereignty involved in these instances. Except for the Philippines, now made independent, 48 U. S. C. A. §1231 *et seq.*, those possessions seem rather clearly included within the coverage of the

Act; indeed, the General Counsel of the Division specifically includes Guam, Guano Islands, and Samoa along with Alaska, Hawaii, Puerto Rico, the Canal Zone, and the Virgin Islands as "territories and possessions" subject to the Act. Release No. 73, Office of the General Counsel Wages and Hours Division.[1] The Act would seem broadly enough phrased, in its purpose "to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce," *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 567, to cover American workmen at Bermuda bases as fully as natives working in Samoa or Guam.[2] [fol. 94] Indeed, the coverage is, if anything, still broader; the statutory reference is to "possession" uncapitalized (unlike the reference to "Territory"), not even to "Insular Possessions," and may indeed be intended to be as broadly inclusive as the simple definition of Webster's Dictionary: "The thing possessed; that which anyone occupies, owns, or controls; in *pl.*, property in the aggregate; wealth; dominion; as, foreign *possessions*." We need not so decide at this time; but we feel compelled to conclude that the intended coverage of the Act is sufficiently broad to include areas such as those here in question.

Defendants urge, and the district court agreed, that the question whether the areas are possessions is a political one, either already settled or to be settled only by executive or legislative determination. Undoubtedly courts should avoid the determination of political issues, but it is difficult to see how this is such an issue. Before us is a matter of interpretation of an Act in issue between two groups of

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[1] Defendants stress the omission of these leased areas from the General Counsel's enumeration. But there is no indication of an intent to exclude all else. An answer to an inquiry, made by the Deputy Administrator, properly stresses the conflicting legal decisions and expresses regret that he cannot give a more definite answer as to those areas. Prentice-Hall Wage and Hour Serv. par. 11,809, 1946.

[2] Thus it was found necessary to extend the more limited coverage of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. §§902(8, 9), 903, as provided in Defense Base Compensation Act of Aug. 16, 1941, as amended Dec. 2, 1942, 42 U. S. C. A. §§1651-1654; *Republic Aviation Corp.* v. *Lowe*, 2 Cir., Nov. 6, 1947.

private parties. Obviously this arises in consequence of political acts, and those conceivably might have been of such precise form or exact agreement with a foreign state as to settle the question. But here they were not, and we must determine this private controversy, even if it arises as to areas affected by an agreement between nations. *Ex parte Cooper*, 143 U. S. 472, with full discussion at 499-503. As a matter of fact the courts have not hesitated to determine the status of acquired territory for the purposes of a particular case and with reference to particular acts of Congress, including those passed prior to such acquisition. [fol. 95] *De Lima* v. *Bidwell*, 182 U. S. 1; *Huus* v. *New York & Porto Rico S. S. Co.*, 182 U. S. 392; *Fourteen Diamond Rings* v. *U. S.*, 183 U. S. 176; *Gonzales* v. *Williams*, 192 U. S. 1; *Faber* v. *U. S.*, 221 U. S. 649; *Hooven & Allison Co.* v. *Evatt*, *supra*; *La Ninfa*, 9 Cir., 75 F. 513.[3]

If, however, the other departments of government have shown a clear view as to the proper answer to this problem, we should certainly take at least careful note of that fact. But, notwithstanding defendants' contentions, it seems clear that they have not. Thus defendants quote from the opinion of the Attorney General upholding the validity of the Executive Agreement here, wherein he states, "The privilege of maintaining such bases is subject only to limitations necessary to reconcile United States' use with the sovereignty retained by Great Britain."[4] But this is aimed at a different problem; it can be easily claimed as authority *favoring* the plaintiffs' position, rather than the reverse. They also cite a letter from the State Department, by its Acting Legal Adviser, to the effect that "this Gov-

[3] Thus, these cases also demonstrate the unsoundness of defendants' further contention that this Act may not apply to a newly acquired possession until Congress has specifically made it applicable. Cases cited by them concern only the guaranties of the Constitution, such as trial by jury, which have been held not to extend to the insular possessions except as Congress has made them applicable. *Balzac* v. *People of Porto Rico*, 258 U. S. 298; *Dorr* v. *U. S.*, 195 U. S. 138, 1 Ann. Cas. 697; *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 674.

[4] 39 Ops. Att'y Gen. 484, 485, re "Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers."

ernment has not made any claim that the bases in Bermuda are territories or possessions of the United States and there would therefore appear to be no reason for any ruling [fol. 96] or opinion on the matter."[5] Both the facts that this statement was made in quite a different setting and that there was "no reason for any ruling or opinion on the matter" clearly negate any suggestion that the Executive Departments have determined the issue.[6]

We have discovered only two cases squarely dealing with this problem, and each has held the Act applicable. *Eckert v. Elmhurst Contracting Co.*, 185 Misc. 108, 56 N. Y. S. 2d [fol. 97] 98, affirmed 186 Misc. 100, 61 N. Y. S. 2d 730;

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[5] The letter addressed to defendants' attorneys is as follows:

"SIRS:

"The department has received your letter of May 1, 1946 with further reference to the status of bases leased from Great Britain.

"The bases in Bermuda were obtained under the same circumstances as the other bases obtained from Great Britain as will be apparent from the documents contained in Executive Agreement Series 235 to which you were referred in a previous communication. As you were advised by the Department's letter of April 30, 1946 this Government has not made any claim that the bases in Bermuda are territories or possessions of the United States and there would therefore appear to be no reason for any ruling or opinion on the matter.

"Very truly yours, For the Acting Secretary of State: R. W. Flournoy, Acting Legal Adviser."

The earlier letter of April 30, 1946, merely answered the specific question whether or not civil courts of the United States had been established in the area. Thus the letter in context shows that the problem considered by the State Department concerned not the present issue, but rather the general status of the leased areas with particular respect to the establishment of civil courts.

[6] Other references seem even less pointed. They include a reply to counsel from the Acting Director, Division of Territories and Island Possessions, of the Department of

Crowe v. *Elmhurst Contracting Co.*, Sup. Ct., N. Y. County, N. Y. L. J. Apr. 17, 1947, p. 1496. *Watt* v. *McWilliam Dredging Co.*, City Ct., N. Y., N. Y. L. J. Nov. 1, 1944, p. 1130, considered the applicability of the Act to a storekeeper on construction work in Greenland in an area leased to this government by Denmark. The court there held for the defendant on the separate ground that plaintiff storekeeper was not engaged in commerce or in the production of goods for commerce under the Act. This case did not decide whether or not the area was a "possession" within the meaning of the Act. In *Filardo* v. *Foley Bros.*, 181 Misc. 136, 45 N. Y. S. 2d 262, the Act was held not to apply to a defense base in Iran; in *Campbell* v. *White Const. Co.*, Civ. No. 28-230, D. C. S. D. N. Y. 1944, unreported, a similar ruling was made as to a base in Brazil. So, too, in *Bernhard* v. *Metcalfe Const. Co.*, D. C. Neb., 64 F. Supp. 953, and *Burns* v. *Metcalfe Const. Co.*, D. C. W. D. Mo., 69 F. Supp. 381, the Act was held not to apply to construction jobs in Canada. The facts in these cases indicate distinctions from those present here. There the problem was whether or not the Act would apply to persons working in foreign countries. Here there is a long-term lease entered into with our government which gives it sweeping powers in the area. Without such arrangements for control these other plaintiffs were shown only to be working in foreign countries to which the coverage of the Act has not been extended.

The affidavit of plaintiff Townsend, cited above, avers that a substantial part of the plaintiffs' duties was to protect goods and materials loaded and unloaded from ships docked at St. George and Hamilton, Bermuda; and included in such materials were thousands of crates that were never opened, but were reshipped to other places. In the light

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the Interior, that no executive order or other directive had given his division jurisdiction over these *military* and *naval* bases; also citation of an Act of March 22, 1943, 34 U. S. C. A. 1201, extending the jurisdiction of naval courts martial to civilian employees and others at naval bases and air bases within areas leased by the United States "without the territorial jurisdiction thereof." *Cf.* Art. IV, of the Executive Agreement, discussed above; also notes 1 and 2, *supra*.

[fol. 98] of this assertion we cannot say they were not engaged in commerce. See *Engebretsen* v. *E. J. Albrecht Co.*, 7 Cir., 150 F. 2d 602; and cases therein cited. Another contention by defendants, that two of the plaintiffs were exempt as executives, was not pressed on this appeal.

Reversed and remanded for further proceedings consistent with this opinion.

[fol. 99] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of November one thousand nine hundred and forty-seven.

Present: Hon. Augustus N. Hand, Hon. Charles E. Clark, Hon. Jerome N. Frank, Circuit Judges.

JOHN JOSEPH CONNELL, et al., Plaintiffs-Appellants,

v.

VERMILYA-BROWN CO., INC., et al., Doing Business as Bermuda Base Contractors, Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs, and cause remanded for further proceedings in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 100] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. John Joseph Connell, et al., v.

Vernilya-Brown Co., Inc., d.b.a. Bermuda Base Contractors.
51. Judgment. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 28, 1947. Alexander M. Bell, Clerk.

[fol. 101] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 102] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 29, 1948

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 52,838. U. S. Circuit Court of Appeals, Second Circuit. Term No. 608. Vermilya-Brown Company, Inc., Necaro Company, Inc., et al., Petitioners, vs. John Joseph Connell, Eugene T. Fitzpatrick, William L. Flanagan, et al. Petition for writ of certiorari and exhibit thereto. Filed February 19, 1948. Term No. 608 O. T. 1947.